**Consolidated Casinos Corporation, Sahara Division *and* General Sales Drivers, Delivery Drivers and Helpers Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Jerry B. Simpson *and* Mike Harrison *and* David C. McAteer, Jr. *and* Jesslyn A. Wilson.** Cases 31-CA-10514, 31-CA-10538, 31-CA-10610, 31-CA-11934, 31-CA-10539, 31-CA-10721, 31-CA-10744, 31-CA-10748, 31-CA-10891, 31-CA-10957, and 31-CA-10723

13 June 1983

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND HUNTER

On 26 October 1982 Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, General Sales Drivers, Delivery Drivers and Helpers Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

In its limited exceptions, the Union asserts that three employees, George Ebersole, David C. McAteer, and Q. B. Bush, should have been included in that portion of the Administrative Law Judge's recommended Order that provides a remedy for 13 named employees who were found to have been unlawfully denied use of Respondent's internal discharge review proceeding. The Union argues that the three employees are part of the same class of employees accorded a remedy and that the omission of their names from the recommended Order was the result of inadvertent error by either the Administrative Law Judge or counsel for the General Counsel. As part of its exceptions, the Union has attached documents in an attempt to support its contention that Ebersole, McAteer, and Bush did lodge appeals with Respondent concerning their discharges. We find no merit in the Union's exceptions.

Initially, we note that the complaint does not allege that Ebersole, McAteer, or Bush was unlawfully denied access to Respondent's internal discharge review proceeding. Nor is the complaint constructed so as to include unnamed discriminatees.[2] At the hearing, neither Ebersole nor McAteer[3] testified concerning his efforts, if any, to utilize the review proceeding and there is no competent record evidence, be it testimonial or otherwise, to justify the inclusion of Ebersole, McAteer, or Bush in the remedy.[4] Accordingly, consonant with fundamental concepts of due process, the Union's exceptions must be denied. *Rushton & Mercier Woodworking Co.*, 203 NLRB 123, 126 (1973); *H. & F. Binch Co.*, 188 NLRB 720, 726 (1971), enfd. as modified 456 F.2d 357 (2d Cir. 1972).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Consolidated Casinos Corporation, Sahara Division, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] In the absence of exceptions by Respondent, we adopt the Administrative Law Judge's Decision and recommended Order pursuant to the provisions of Sec. 10(c) of the Act. Accordingly, our action should not be construed as an endorsement by the Board of all of the Administrative Law Judge's findings and conclusions.

[2] See, e.g., *Ironworkers Local 480 (Building Contractors of N.J.)*, 235 NLRB 1511, 1512, fn. 4 (1978).

[3] Bush did not testify.

[4] As for the documents attached to the exceptions, those documents were not made part of the record and cannot now be relied upon by the Board. See Sec. 102.54(b), National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended.

## DECISION

### STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This litigation was heard during 19 days of hearing in Las Vegas, Nevada, in the months of March, April, and May 1982. The matter arose as follows:

General Sales Drivers, Delivery Drivers and Helpers Local 14, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), filed the following charges on the dates indicated against Consolidated Casinos Corporation, Sahara Division (herein Respondent): Case 31-CA-10514 on October 10, 1980, Case 31-CA-10538 on October 17, 1980, and Case 31-CA-10610 on November 5, 1980. Jerry B. Simpson, an individual, filed a charge in Case 31-CA-10539 against Respondent on October 17, 1980. Mike Harrison, an individual, filed the following charges on the dates indicated against Respondent: Case 31-CA-10721 on December 16, 1980, Case 31-CA-10744 on December 24, 1980, Case 31-CA-10748 on December

29, 1980, and Case 31-CA-10891 on February 23, 1981. David C. McAteer, Jr., an individual, filed a charge in Case 31-CA-10957 on March 18, 1981, against Respondent. On May 21, 1981, the Regional Director for Region 31 of the National Labor Relations Board (Regional Director and the Board, respectively) issued an order consolidating cases, consolidated complaint, and notice of hearing with respect to the above-cited cases.

On December 19, 1980, Jesslyn A. Wilson, an individual, filed a charge in Case 31-CA-10723 against Respondent. The Union filed a charge in Case 31-CA-11934 against Respondent on February 26, 1981. On March 11, 1982, the Regional Director issued an order consolidating cases, amended consolidated complaint, and notice of hearing consolidating the above-cited additional charges with those in the outstanding complaint.

The amended consolidated complaint, as further amended at the hearing, alleges a wide variety of conduct by various individuals acting as agents of Respondent as violative of the provisions of the National Labor Relations Act (the Act). Included in the complaint are allegations that Respondent's agents: (1) interrogated, threatened, and otherwise coerced employees in violation of Section 8(a)(1) of the Act; (2) discharged employees in violation of Section 8(a)(3) and (1) of the Act; (3) denied employees the right to the presence of a representative during interviews from which they reasonably believed disciplinary action might result in violation of Section 8(a)(1) of the Act; and (4) denied employees certain appeal rights from adverse actions against them because of their union activities and because they were named in or associated with charges filed with the Board in violation of Section 8(a)(3), (4), and (1) of the Act. Respondent denies it is responsible for the conduct of certain alleged agents, denies the conduct and motivations attributed to the alleged agents, and further denies that any conduct which did occur in any way violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file post-hearing briefs.

Upon the entire record herein,[1] including the very helpful briefs of the General Counsel and Respondent,[2] and from my observation of the witnesses and their demeanor, I make the following:[3]

## FINDINGS OF FACT

### I. JURISDICTION

Respondent is, and has been at all relevant times, a Nevada state corporation which operates, *inter alia*, a hotel and casino in Las Vegas, Nevada, known as the Sahara. Respondent annually enjoys gross revenues in excess of $500,000 from its business operations and annually purchases and receives goods and services valued in excess of $50,000 from suppliers located outside the State of Nevada.

### II. LABOR ORGANIZATION

The Union is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *General Background and Chronology*

The events in question herein occurred almost entirely at the Sahara Hotel in Las Vegas, Nevada (the Hotel), during the year 1980. Respondent holds the gaming license for the Hotel as required by the Nevada Gaming Control Act. At relevant times the Hotel was a wholly owned subsidiary of the Sahara Nevada Corporation which was in turn a wholly owned subsidiary of the Del E. Webb Corporation. At relevant times the Del E. Webb Corporation also operated other hotel and gaming facilities in Las Vegas, Reno, and South Lake Tahoe, Nevada, and was in the process of obtaining a license to operate the Claridge Hotel, a hotel and casino in Atlantic City, New Jersey.

The Hotel employs over 2,000 employees. In addition to providing rooms and food and beverage service, the Hotel operates a gaming or casino area and provides associated entertainment. Over half of the Hotel's employees are represented by various labor organizations and are covered by various collective-bargaining agreements. The casino or gaming employees, who number in excess of 500 and are the only employees involved herein, were previously unorganized and were involved in an organizational campaign involving the Union in the latter half of 1980. The Union filed a representation petition docketed as Case 31-RC-4841 on July 25, 1980.[4] An election was held on October 25 pursuant to a Stipulation for Certification Upon Consent Election in the following unit at the Hotel (the unit):

> All gaming casino dealers including keno writers, keno runners, twenty-one dealers, crap dealers, baccarat dealers and shills, poker dealers, pan dealers, poker and pan shills and shill dealers, extra board dealers and oriental games dealers employed at the Hotel located at 2335 Las Vegas Boulevard South, Las Vegas, Nevada; excluding all other employees including casino shift managers, assistant shift managers, pit bosses, pit floormen, boxmen, slot shift supervisors, floormen, slot mechanics, booth cashiers,

[1] Respondent's unopposed motion to correct the transcript is hereby granted.

[2] Respondent also filed a subsequent supplemental brief citing a decision which had not issued as of the final due date for post-hearing briefs. While such a submission is appropriate, Respondent's citation was to a decision of the General Counsel's Division of Advice, a decision which is based on the General Counsel's prosecutorial discretion and not a decision of the Board binding on me.

[3] Many factual elements of this extensive litigation were resolved by the pleadings, stipulations, and admissions of fact, or by unchallenged credible documentary and testamentary evidence. Where not otherwise noted, the findings contained herein are based thereon.

[4] All dates hereinafter refer to 1980 unless otherwise indicated.

change girls, casino cage cashiers, slot cage cashiers, coin counters and wrappers, pit clerks, credit clerks, office clerical employees, guards, and supervisors as defined in the Act, as amended.

The Union won the election and, after resolution of post-election matters not here relevant, the Board certified the Union as the exclusive representative of the employees on March 29, 1982. As of the conclusion of the hearing, the Hotel had at all times refused to recognize and bargain with the Union as the representative of the employees in the unit. On September 30, 1982, the Board issued its Decision and Order requiring Respondent to bargain with the Union in *Consolidated Casinos Corp.*, 264 NLRB No. 92 (1982).

### B. *Agency Allegations*

#### 1. Undisputed categories

As a result of the amended pleadings, various stipulations of fact during the hearing, and other admissions at the hearing and on brief, the bulk of the supervisory and agency allegations in the complaint were not in issue. Thus, I find that the Hotel's personnel with the following job titles are supervisors and agents of Respondent: general manager, casino manager, personnel director, shift manager, pit manager, pit shift supervisor, and pit supervisor or pit boss.[5]

#### 2. Disputed categories: boxmen and floormen

##### a. *Evidence*

The General Counsel alleged various individuals with the job titles of "floorman" and "boxman" were supervisors within the meaning of Section 2(11) of the Act. Respondent denied these allegations and the supervisory status of individuals in these categories was closely litigated.[6] An understanding of the duties and responsibilities of the boxmen and floormen requires a brief discussion of their roles in the Hotel's gaming operations.

Various casino games at the Hotel are played between members of the public and dealers in an area known as the pit. Craps is played at a table staffed with several dealers and a boxman. Floormen oversee the various games and the personnel involved, including dealers and boxmen. The Hotel has in force a body of rules and regulations regarding employee conduct as well as elaborate procedures controlling the playing of the games themselves and the issuance of credit in regard thereto. The floormen closely monitor the dealers and the games for compliance with the regulations and procedures, have a role in credit transactions, and assist in "promulgating customer relationships." Respondent's written job descriptions in effect in 1980 reveal the hierarchial structure of pit employees. Thus, the shift managers have the explicit authority to "fire and discipline" employees and are charged with the duty to "supervise and direct" pit bosses and other personnel. The pit boss in turn is authorized to supervise the 21 pit and direct the 21 and craps floormen. The job description for the baccarat floorman recites, as the first of the employee's major responsibilities, "To execute and implement" the orders of the manager. In this floorman's job description the space provided for "Supervisory or direction responsibilities" contains the entry "direct control of dealers, starters and clerks." The job description further recites that the floorman has "recommendatory" powers with regard to hiring and firing. The "dice" floorman job description lists the "enforcement of procedures" as a major job responsibility and indicates the floorman has "some" influence over hiring and firing. The dice or craps floorman supervises two boxmen and four craps dealers. The boxman's job description indicates the primary function of the boxman is to observe the game. It also recites that the boxman supervises dice dealers and has "some" influence over hiring.

Floormen and boxmen must be experienced and qualified dealers. Floormen are paid at a rate two to three times higher than dealers, the boxmen somewhat less than floormen. Neither classification is allowed to accept gratuities. This means that neither boxmen nor floormen are necessarily better compensated than particular or even average dealers who derive substantial income from tips. Dealers wear a uniform when on duty. Floormen and boxmen wear jacket and tie. The Hotel supplies meals to its employees. Dealers use the "help's hall" or employee cafeteria located in the Hotel. Boxmen and floormen are allowed use of the Hotel's coffeeshop and order from the regular menu. Other fringe benefits, such as the assignment of parking, appear to be uniform among dealers, boxmen, and floormen.

Jeanette Armstrong, Respondent's director of personnel, and Tony Packe, pit manager, testified that floormen and boxmen have no authority to hire, fire, suspend, discipline, or issue warnings to dealers. Rather, the procedure as described by Packe was that the floorman or boxman call the pit supervisor and request that he issue a warning or otherwise administer discipline to an errant dealer. Dealer Ray Fritz testified that while warnings to dealers can be "written up by anyone in the chain of command," including floormen, the warnings must be signed by the pit supervisor or a higher level employee.

Various dealers testifying for the General Counsel asserted that the floormen were in charge of dealers' gaming conduct and had "ultimate power" over them. Few direct examples of that power were described other than as noted above. Floormen who testified, however, also took the view that they were separate and apart from dealers. For example, floorman Jayson Brown testified that he was "part of management" and therefore did not vote in the union representation election. In the various conversations between dealers and floormen alleged as violative of the Act, discussed in detail *infra*, it is clear that floormen identified themselves as members of management in their relationships with dealers.

[5] Although Respondent denied the supervisory and agency status of pit boss Lou Massonie in its answer, there was no real contention at the hearing or on brief that the pit supervisor or pit boss is not a supervisor as defined by Sec. 2(11) of the Act. Were there a dispute as to Massonie's status, I would find without difficulty that as pit boss he exercised the power to discipline employees and was a supervisor within the meaning of the Act.

[6] The parties treated the various individuals in each category as having identical duties and responsibilities.

b. *Analysis and conclusions*

(1) Floormen

Casino gaming by its very nature requires close observation and supervision both of the gaming public and Hotel employees as well as the adoption and close enforcement of detailed procedures controlling all aspects of play. The Hotel clearly applies such standards to its casino operations and utilizes the floormen as a critical part of that process. It is clear and I find that floormen regularly exercise broad powers of direction and control over dealers in this sense. The Board has held, however, that this type of direction by floormen, standing alone, does not confer supervisory status. Thus, the Board held in *Silver Spur Casino*, 192 NLRB 1124, 1125 (1971):

> Although the floormen control the poker department in the absence of the manager, they do not possess the power to hire, discharge, or discipline the remaining employees in the department. Moreover, any orders by the floormen directed to the dealers and shills are in accord with established procedure. In these circumstances, we find that the poker floormen are not supervisors within the meaning of the Act.

The Hotel's floormen, however, are not limited to giving instruction and/or correction to dealers. They may bring complaints to the pit boss or to other admitted supervisors from which dealer discipline may result. So, too, by the very terms of their job description, they have "recommendatory" authority regarding hiring and firing. Dealers are aware of their obligation to comply with the Hotel's regulations and that the regulations are interpreted and applied by their directing floormen. It is clear dealers are not free to disregard the orders of a floorman. Indeed, the job description for the craps dealer indicates that the dealer "reports to assigned Floorman who is responsible for the fulfillment of the function, duties and relationship of the position."

These additional duties and responsibilities on balance bring the floormen to the level of supervisors as defined by the Act even assigning the burden of proof on the issue to the General Counsel. The giving of orders and instruction backed by the authority to bring the nonconforming dealers to account, as opposed to the mere enforcement of established gaming procedures, goes to the essence of the supervisor-supervisee relationship. These supervisory duties and responsibilities are confirmed by the Hotel's job descriptions.[7]

Beyond actual supervisory authority, there is significant evidence that the Hotel held out the floormen to the dealers as having apparent authority over them. The clear and obviously deliberate separation of dealers and floormen is reflected in their differing roles during gaming play and in resolving disputes with regard thereto, in the garments they wear, and in their assigned eating places. The very fact of the floormen's exclusion from the agreed-upon election unit,[8] while not relevant to the issue of actual supervisory authority, is yet another occurrence which indicated to floorman and dealer alike that floormen were separate and apart from dealers; i.e., "members of management." This perception of, at least, apparent authority on the part of the floorman is also evident in the credited statements of floormen to dealers, *infra*, that floormen regarded themselves as aligned with and/or speaking on behalf of management during the union election campaign.

Accordingly, for all the above reasons, I find that the Hotel's floormen during the relevant period were supervisors and agents of Respondent with both actual and apparent authority over dealers. Thus, I find the General Counsel had met his burden of proof with respect to the floormen allegations in paragraph 5 of the complaint.

(2) Boxmen

Much of the analysis concerning floormen, *supra*, applies to boxmen with several differences. First, where at least one of the floorman job descriptions notes floormen have "recommendatory" authority over hiring and firing, the boxman job description's equivalent authority is listed only as "some." Second, where the craps dealer job description recites that it is the floorman to whom the dealers are responsible, it also informs the dealer that he will receive work "direction" from the boxman. Third, a finding that the boxmen were supervisors would produce an unusually high ratio of supervisors to unit personnel in the craps pit given that the craps floormen have been found supervisors.

The limited authority exercised by the boxmen as well as the fact that boxmen are involved as are dealers in the game itself, rather than removed from it as are the floormen, acts to limit any argument that the boxmen have apparent authority despite the common circumstances, noted *supra*, between the boxmen and floormen. Limited testimony was received regarding boxmen's acts during relevant periods. The only agency allegation involving boxmen deals with Pryor Harrel a/k/a Alabama. The General Counsel's evidence is that Harrel, in effect, asked a dealer how he was going to vote in the election and, when the employee said that he would vote for the Union, Harrel said, "Well, that's good, you ought to." Such evidence, if credited, does not offer independent support for the General Counsel's supervisory allegations regarding boxmen.

Keeping in mind the burden of proof the General Counsel bears on all allegations in the complaint and further noting the relative paucity of evidence of actual or apparent supervisory authority of boxmen, I find that the General Counsel has failed to prove that Harrel, or any other boxman, was an agent of the Hotel at relevant times. Accordingly, I shall dismiss this portion of para-

[7] The testimony of Packe and Armstrong diminishing the exercise of authority by the floormen is met by the argument of the General Counsel who notes: "[I]t is well settled that the existence of authority, not the exercise of that authority, determines whether an individual is a supervisor. *The New Jersy Famous Amos Chocolate Chip Cookie Corp.*, 236 NLRB 1093 (1978)."

[8] The Board has held an all-inclusive unit of gaming employees is an appropriate bargaining unit. See, e.g., *El Dorado Club*, 151 NLRB 579 (1965). In this and later Board cases floormen and boxmen were included or excluded from particular gaming bargaining units depending on their supervisory status in particular casinos.

graph 5 of the complaint. As a direct consequence of the General Counsel's failure as to Harrel, it follows that I also dismiss paragraph 15 of the complaint which depends on Harrel's status as an agent of Respondent.

### C. *Allegations of Statements Violating Section 8(a)(1) of the Act*

The complaint contains numerous allegations of statements of individuals found to be agents of the Hotel, *supra*, which are alleged as violations of Section 8(a)(1) of the Act. It appears appropriate to deal separately with the various arguments concerning each allegation in the order they appear in the complaint.

#### 1. Complaint paragraph 6(a)—Michaels interrogates Nelson

##### a. *Evidence*

Former dealer and alleged discriminatee Gloria Nelson testified that sometime in the period June through September 1980 she spoke alone in the 21 pit with floorman Larry Michaels. After an initial colloquy about Nelson's health, Michaels told Nelson, in Nelson's recollection, that for her own information she should know she was being discussed in management meetings and that she should watch herself carefully. Nelson thanked him and the conversation ended.

Michaels did not testify for he died on March 31, 1981. Respondent adduced evidence, however, that Nelson's version of this conversation did not appear in any of the 17 affidavits she gave in conjunction with this case. The Hotel further showed that the General Counsel's Las Vegas Resident Officer on or about January 27, 1981, related the allegations of the soon-to-issue complaint to Respondent's counsel who had earlier indicated he wished to independently investigate the merits of the Government's allegations. The Michaels' allegation was not included in the Resident Officer's recital of the allegations of the complaint. Respondent first learned of the Michaels' allegation only upon receipt of the May 21, 1981, complaint; i.e., after Michaels' death.

##### b. *Analysis and conclusions*

Respondent's threshold defense to the allegation is that the Government's omission to reveal the Michaels' allegation, in the circumstances noted above, until after Michaels' death requires that the count be dismissed without considering the substantive evidence. Respondent correctly notes that the Board has held[9] that allegations against agents of respondents deceased at the time of a hearing will stand although the evidence must be carefully scrutinized. Respondent argues here rather that the General Counsel's refusal or at least negligent omission to inform Respondent's counsel that Michaels was an accused agent in the January telephone call caused Respondent to detrimentally rely on the omission. Thus, Respondent failed to interview or take an affidavit from Michaels on the allegations during the remaining weeks of his life. Accordingly, Respondent was unable to rebut the evidence of the General Counsel at the hearing and therefore suffered prejudice in the nature of laches.[10]

Were there sufficient evidence to suggest that the General Counsel, through his Resident Officer, withheld the Michaels' allegation from Respondent's counsel for the purpose of foreclosing Respondent's inquiry into the merits of the allegation, I would not hesitate to strike this paragraph of the complaint. The record evidence does not rise to that level, however, and I cannot find the General Counsel was either negligent or knowing in his omission. Regarding the Respondent's argument that the equities require, under the doctrine of laches, that the allegation be dismissed, the brief answer is that laches do not lie against the General Counsel for negligent delay. Employees' rights will not be discounted to the benefit of a respondent where prosecutorial delay by the General Counsel is not calculated to deny respondent a fair hearing. Cf. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). See also *Ventura Coastal Corp.*, 264 NLRB 291 (1982). Therefore, I shall not dismiss the allegation on the procedural grounds advanced by Respondent but rather shall turn to the merits.

I have carefully scrutinized the testimony of Nelson concerning Michaels' statement, noting: (1) the fact that at the time she testified she knew Michaels was dead and (2) the fact that no reference to the Michaels' conversation was contained in her numerous affidavits.[11] Despite these cautions, I fully credit Nelson's testimony regarding her conversation with Michaels. The conversation is not implausible given the activities of Nelson during the period, as discussed *infra*. And, because of the conversation's rather subtle content, it is not improbable that Nelson would have forgotten the remark during the various conversations and interviews involved in the preparation of her numerous affidavits. Most importantly, however, I make this finding because to discredit Nelson—who testified to a specific conversation with a specific individual in unambiguous terms—would suggest I doubt her credibility. To the contrary and as noted in greater detail *infra*, I found her a persuasive witness with a very convincing demeanor.

Even given this factual finding, Respondent raises additional arguments. First, it notes that Nelson's version of events is at variance with the specific wording of the allegation in the complaint. Thus, Michaels' allusion to Nelson that she was the subject of management discussion is clearly not an interrogation about her union activities as alleged in the complaint. Second, Respondent argues that Michaels' statement as testified to by Nelson, if made, did not violate the Act. The Board with court approval has traditionally held that, given full litigation of an event or circumstance, a variance between the complaint and the proof is not fatal and that a judge's

[9] Citing *Sears Roebuck & Co.*, 224 NLRB 558 (1976); *Goodwater Nursing Home*, 222 NLRB 149 (1976); and *United Aircraft Corp.*, 192 NLRB 382 (1971).

[10] No evidence was offered regarding Michaels' health in the last months of his life or whether in fact it would have been possible for Respondent to interview him on the issue had it learned of the allegation in January.

[11] As discussed in greater detail *infra*, the numerous affidavits of various witnesses, including Nelson, and the circumstances of their preparation and adoption were adverse factors in weighing the credibility of each witness, including Nelson.

decision may address the conduct litigated or may include an order amending the complaint to conform to the proof. *Alexander Dawson v. NLRB*, 586 F.2d 1300, 1304 (9th Cir. 1978); *NLRB v. Iron Workers Local 433*, 600 F.2d 770 (9th Cir. 1979); *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980). Consistent with the former alternative I shall address the conduct of Michaels litigated at the hearing.

The Board has found various types of conduct violative of Section 8(a)(1) of the Act and there is a tendency to seek to fit specific conduct into one of a number of conventional categories; e.g., threats, interrogations, the creation of the impression of surveillance, etc. The Michaels' statement fits no such common category, but in my view is nevertheless violative of Section 8(a)(1) of the Act. Michaels told Nelson, even if in an attempt to offer friendly advice, that she was under discussion by management. Nelson was at that time a leading union organizer at the Hotel and the only fair inference she could draw from Michaels' statement was that management was discussing her because of her considerable union activities. Any employee in such circumstances would perceive this state of affairs as a sign of possible adverse consequences. Indeed, Michaels specifically warned her to "watch herself." Thus, the statement, irrespective of its truth, i.e., whether or not Nelson was in fact being discussed by management, may reasonably be expected to have chilled Nelson's activities in support of the Union. Therefore, the statement violates Section 8(a)(1) of the Act, and I so find.

### 2. Complaint paragraph 6(b)—Musick interrogates Nelson

#### a. *Evidence*

Nelson testified that she spoke alone with pit boss Jack Musick during the June–September 1980 union campaign in the pit. She recalled that after initial conversation regarding her health Musick asked her if the union "thing" was all right. Nelson said yes and Musick answered, "I told you to get out of this." Nelson demurred and the conversation ended. Musick, still at the Hotel, testified that he and Nelson worked together during the period and that he may have asked her about her health. He testified further that he did not make any reference to the Union in his conversation with her nor did he discuss the Union with other employees.

#### b. *Analysis and conclusions*

As noted, I found Nelson an effective witness with a convincing demeanor and a sound recollection, despite the impediment of her affidavits and the fact that she is an alleged discriminatee with a stake in the outcome of the case. Musick, to the contrary, impressed me as a witness who recognized that as a supervisor at the Hotel he could not properly have talked to Nelson or other dealers about union activities. I find that recognition affected either his recollection of events or his willingness to be fully forthcoming on the issue. I therefore reject his denials and credit Nelson.

The Board holds that questioning of even well-known union supporters about their union activities violates Section 8(a)(1) of the Act. *PPG Industries*, 251 NLRB 1146 (1980).[12] Here, the credited testimony shows that Musick went further and, obviously in an "I told you so" context, recalled that he had earlier suggested Nelson abandon her union efforts. Despite the fact that such remarks were likely offered out of sympathy for Nelson, Musick's words clearly associated unhappy consequences with her union activities. Such conduct also violates Section 8(a)(1) of the Act, and I so find.

### 3. Complaint paragraph 6(c)—Sears interrogates Nelson

#### a. *Evidence*

Nelson testified that she had a conversation alone with floorman Duke Sears in early July. In her version of the conversation Sears asked Nelson how "the Union thing" was going. Nelson answered "fine." Sears then said that he had told Lynn Simons, the corporate vice president, that if he, Sears, had more authority he could "stop this union thing." Sears recalled having had a conversation with Nelson, a personal friend, in September in which she mentioned that she was tired. He asked her why and she responded that it was because of the union matter. Sears then told her that he had had a conversation with Simons in which he told Simons that he felt he could keep the dealers from voting union. Sears told Nelson that Simons had replied that, if he could stop the Union, he, Simons, would appreciate it. Sears testified that he had several conversations with Nelson during the period at issue but could not bring them to mind.

#### b. *Analysis and conclusions*

Again for the reasons noted, I found Nelson highly persuasive and credible. Sears, while not incredible, seemed to me to lack the accuracy of recollection that Nelson demonstrated regarding her conversation. Where the two versions differ I credit Nelson over Sears. Given this finding, it follows that Sears' conduct violated Section 8(a)(1) of the Act. *PPG Industries*, above.

### 4. Complaint paragraph 6(d)—Schiffman interrogates Nelson

#### a. *Evidence*

Nelson testified that she had a conversation with floorman Paul Schiffman during the union campaign alone in the pit. Schiffman asked her how many authorization cards had been signed. Nelson answered that 150 to 200 cards had been signed. Schiffman, at the time of the hearing a pit boss for Respondent in New Jersey, testified that he worked with and conversed with Nelson

[12] I am aware that *PPG* and other similar cases have not necessarily been viewed with approval by Chairman Van de Water and Member Hunter. See, e.g., *Nissan Motor Corp.*, 263 NLRB 635, fn. 1 (1982). Administrative law judges, however, are bound to follow Board decisions unless and until they are modified or reversed by the Board or the Supreme Court. Reservations and/or overt disapproval by individual members of the Board as to specific cases cannot diminish the binding force of the Board decisions.

during the period but that he never asked how many authorization cards had been signed.

b. *Analysis and conclusions*

Schiffman's demeanor was markedly inferior to that of Nelson. I credit Nelson's specific recollection over the denial of Schiffman. As noted, I have found Nelson to be a truthful witness with an accurate recollection. Schiffman may well not recall the conversation and, in any event, could easily feel called upon to serve what he may feel is management's interest by denying the conduct attributed to him. Given this factual finding, Schiffman has engaged in a classic interrogation of an employee regarding the union activities of others. Such conduct chills employees' Section 7 rights and thereby violates Section 8(a)(1) of the Act, and I so find.

5. Complaint paragraphs 7(a) and (b)—Owens threatens Griffith

a. *Evidence*

Former dealer and alleged discriminatee Deanne Ball Griffith testified that she had a conversation with floorman Cyndie Owens in early or mid-July alone in the pit. Griffith testified that Owens initiated the conversation by stating that she guessed, "You guys are going to take the big step?" Griffith did not respond directly whereupon Owens said that, if the dealers thought they had it "bad" currently, they should wait until the Union got in. Owens continued stating, were the Union successful, "tokes" would be sent to the "cage" and taxed.[13]

Owens testified that she worked with and conversed with Griffith during the period, but specifically denied discussing or alluding to the Union as a "big step" or any adverse consequence to dealers resulting from a union victory. She added that a personal matter of grave importance preoccupied her during this period and that as a consequence she was not then concerned with the matters in controversy.

b. *Analysis and conclusions*

Acknowledging the effectiveness of Respondent's attack on Griffith's testimony,[14] I found her demeanor so superior to that of Owens that I have no trouble crediting her version of the events. While Owens' demeanor was less than that of Griffith, I do not find she was testifying falsely but rather had a failure of memory. I simply believe Griffith honestly testified. Her recollection of the specific remarks and the identity of Owens as their speaker would not likely be misrecalled.

Given this factual finding, it is clear that Owens' remarks constitute: (1) an interrogation regarding Griffith's union activities and the union activities of others and (2) a direct threat that if the Union were successful dealers, including Griffith, would be less well off.[15] In each case there was a violation of Section 8(a)(1) of the Act, and I so find.

6. Complaint paragraphs 8(a) and (b)—Gall interrogates Orlando and tells him management is hiring antiunion dealers

a. *Evidence*

Francis Orlando, Jr., a craps dealer at the Hotel, testified that he had two conversations with floorman Andy Gall during the organizational campaign. The first occurred in mid-July at an empty craps table. Orlando testified that Gall asked him how the Union was going and the extent of dealer support for the Union. Orlando responded that the campaign was fine but that he would not tell Gall the extent of union support among the dealers. Orlando placed the second conversation in August under similar circumstances. At that time Gall told Orlando that management wished to hire three female 21 dealers who opposed the Union. Gall was a pit boss for the Hotel at the time of his testimony. He acknowledged his proximity to Orlando during the period and that he had discussed the Union with hotel employees. He did not recall a specific conversation with Orlando, however, nor the remarks attributed to him by Orlando.

b. *Analysis and conclusions*

I credit the detailed testimony of Orlando, a current employee, over the vague denials of Gall. Orlando impressed me as an honest and forthcoming witness with little interest in other than accurately answering the questions asked him. Gall seemed to me to be attempting to avoid embarrassing his employer through the device of failing to recollect the events in issue. I found Gall's demeanor to be significantly inferior to Orlando's. Given this factual resolution, it is clear for the reasons noted *supra* that Gall's questions about union support violate

[13] I take this remark to be gaming cant for the proposition that customer tips received by dealers would for the first time be monitored as to amount and the amount noted and either revealed to the United States Internal Revenue Service or made subject to normal Federal income tax withholding regulations. Implicit in the statement is the not unreasonable assumption that some dealers, aware that the amount of their tips was not formally recorded by the Hotel, might not be fully disclosing and paying appropriate taxes on their tips and therefore might pay more taxes under the monitoring system suggested.

[14] Deanne Ball Griffith, like Nelson and, to a lesser extent, other employees, had prepared and adopted an extraordinary number of affidavits covering the issues is dispute. The bulk of the affidavits were apparently prepared by an attorney retained by an employee group and were based on communications and notes made by Griffith and others concerning various conversations. These affidavits suffered from a heavy application of legal jargon to the descriptions given by the employees. The affidavits also contained various blank spaces for the employees to complete before they signed them. The affidavits were not prepared by means of close or extensive communication between the preparer and the affiant, but were prepared based on notes and then returned to the affiant for completion. The "mail order affidavits," as Respondent emphasizes, are not as likely to accurately record events as Board-prepared affidavits and, on the record in this case, may be suspected of improperly influencing the testimony of each witness who used the affidavits to refresh his or her recollection prior to testifying. Generally, one or two Board affidavits were also prepared for and sworn to by each employee. Further, the affidavit prepared by Griffith which recited her conversation with Owens here at issue contained neither a reference to the taxation of tips nor to "the big step" comment attributed by Griffith to Owens.

[15] Respondent may find no shelter in the proposition that, because employees are legally obligated to pay Federal income tax on tips, a threat to force them to do so is not a threat under the Act. Where employees are threatened with loss of any benefit, legal or illegal, because of their union activities or because of the outcome of a union election, the Act is violated.

Section 8(a)(1) of the Act. Gall's statement that management was considering hiring antiunion employees is a statement to an employee that hiring would now be based on impermissible considerations of employee union sentiments and further that the employer would resist union organization by illegal means. Such statements, irrespective of their truth, violate Section 8(a)(1) of the Act. Cf. *Anchorage Times Publishing Co.*, 237 NLRB 544 (1978), enfd. 637 F.2d 1359 (9th Cir. 1981).

### 7. Complaint paragraphs 9(a) and (b)—Sedgwick interrogates Guffre

#### a. *Evidence*

Vince Guffre, a craps dealer at the Hotel, testified to a conversation with then swing shift boss Bob Sedgwick alone in the pit on the evening of July 18. Guffre testified that Sedgwick asked Guffre how the union drive was going. Guffre responded that it was fading. Sedgwick said that was what he thought too, then added that "they're asking upstairs."[16] The conversation ended. While Guffre is still employed by the Hotel he has admitted bias against it and in favor of the Union. Sedgwick, who left the Hotel in August 1980, testified that he did not make the comments exactly as attributed to him and further that he did not know that a union drive was underway in July. While he did admit to hearing "union talk" in July, he testified that he considered it but preorganizational. He also admitted talking to Guffre about that "union talk" and the fact that union activity had died down.

#### b. *Analysis and conclusions*

Sedgwick had no particular reason to testify in favor of Respondent while Guffre, even though a current employee, was admittedly unsympathetic to the Hotel and wished to help the Union. Nevertheless, I do not believe that Guffre shaped his testimony or otherwise succumbed to bias. Rather, I found his demeanor sound and his recollection clear. I found Sedgwick had a weak memory of events. I do not credit his denials over the specific recollections of Guffre. Thus, I credit Guffre's version of the events over Sedgwick's where the two differ. Given this factual finding, I also find that Sedgwick interrogated Guffre concerning the union activities of unit employees, a clear violation of Section 8(a)(1) of the Act, and therefore sustain paragraph 9(a) of the complaint. I do not find, however, that the credited testimony of Guffre supports a finding that Respondent engaged in the surveillance of employees' activities. Sedgwick's remark indicated to Guffre only that management was interested in union activity and was asking other management officials their opinion. No reasonable inference may be drawn from Sedgwick's statement that management was actually surveilling employees, and therefore no impression of surveillance may be found. Accordingly, I shall dismiss paragraph 9(b) of the complaint.

[16] The "upstairs" reference is to management officials whose offices were located on the higher floors of the Hotel.

### 8. Complaint paragraph 10—Massonie interrogates Griffith

#### a. *Evidence*

Griffith testified that on July 22 pit boss Lou Massonie asked her if she had attended the employee meeting at Gloria Nelson's house.[17] Griffith said she had. Griffith testified that she did not ask Massonie for his opinion of the Union in this meeting. Her affidavits given to a Board agent, however, recite that she did so ask and that Massonie answered that he was in favor of dealers joining the Union. Massonie, a longtime employee of the Hotel, admitted his proximity to Griffith during work hours in July and the likely occurrence of repeated work-related conversations. He specifically denied asking the question attributed to him or even knowing about a meeting at Nelson's house.

#### b. *Analysis and conclusions*

As noted *supra*, I found Griffith's demeanor impressive and here find it significantly superior to Massonie's whose denials struck me as both self-serving and unconvincing. He seemed anxious to avoid embarrassing the Hotel and therefore may have been reluctant to admit his conduct. I credit Griffith over Massonie. Consistent with my analysis *supra*, I find that Massonie's question regarding employees' concerted activity inherently tends to chill such activity and therefore violates Section 8(a)(1) of the Act.

### 9. Complaint paragraph 11—Crane interrogates Fitz

#### a. *Evidence*

Dealer Raymond Fitz testified to a conversation alone with floorman John Crane at a "dead" table in June or July. Crane asked Fitz what his stand was on the Union. Fitz said he was "affirmative" for it. Crane asked why. Fitz then told Crane that seniority meant nothing at the Hotel and dealers had to vote the Union in to protect their jobs. Crane, who left the Hotel in February 1981, is now employed out of State and out of the gaming industry. He recalled a different set of circumstances involving Fitz. Crane testified that he had occasion to caution a dealer at a table next to one where Fitz was dealing to desist from discussing the Union with customers. In Crane's memory Fitz then interjected and told Crane that he was for the Union and that Crane could not talk to other dealers as he had.

#### b. *Analysis and conclusions*

The differing versions of the conversation present a clear credibility conflict which I resolve in favor of Crane. Crane is no longer in the Hotel's employ and had no apparent interest in shaping his testimony. His demeanor was impressive and his testimony convincing. I believe it more likely that Fitz has misrecalled events. I found his certainty at the hearing to be as likely based on general conclusions regarding the guilt of the Hotel as

[17] During this period Nelson had several employee meetings at her home regarding the Union's organizational campaign.

on his clear memory of specific events. Given this factual resolution I find no violation of the Act and therefore dismiss paragraph 11 of the complaint.

### 10. Complaint paragraph 12(a)—Cross tells an employee unionization would be both impossible and, if successful, futile

#### a. *Evidence*

Rex Kidd, a dealer at relevant times at the Hotel, testified that he had a conversation with floorman Howard Cross in the pit in August 1980. An organizational meeting of employees which had received extensive press and television coverage had recently been held. Cross asked Kidd, in Kidd's memory, how the "turnout" at the meeting had been. Kidd said it had been fairly good. Later in the conversation Cross said that the Union would never get in because the Hotel could hire people off the street who would vote against the Union. Cross, no longer employed by the Hotel, testified that he knew Kidd and worked with him but that he never had a conversation with him regarding the Union or the futility of union representation.

#### b. *Analysis and conclusions*

While Kidd is still an employee of Respondent he admittedly feels his employer has issued him unwarranted reprimands. He is also sympathetic to the Union. Cross is no longer employed by Respondent and has no apparent reason to shape his testimony. The credibility resolution necessary here would be difficult, in isolation, but for my resolution *infra* of a credibility conflict wherein I found that Cross did not accurately testify regarding his conduct or knowledge involving employee Nelson. Kidd, despite the bias noted, appeared to me to be an honest witness with a convincing demeanor. I do not find it reasonable that he would be mistaken regarding a matter so unlikely to be confused with other conversations. Nor do I believe he would have misidentified the speaker. Accordingly, I credit Kidd over Cross. For the reasons given *supra*, such conduct violates Section 8(a)(1) of the Act, and I so find.

### 11. Complaint paragraphs 12(b) and (c)—Cross interrogates Nelson

#### a. *Evidence*

Nelson testified that Cross spoke to her alone in the pit sometime in the period June to September. Nelson recalled that Cross asked her how many pledge cards the Union had. Nelson said she did not know the exact number as some were handed in and some mailed. Cross then said, in Nelson's memory, that management was interested in the number of pledge cards. Cross specifically denied having such a conversation about cards with Nelson and further denied any knowledge or understanding of what such cards were or meant.

#### b. *Analysis and conclusions*

I have previously noted the persuasiveness and weight I attach to the testimony of Nelson based on her demeanor during lengthy testimony. While Cross was not an incredible witness, and mindful of the burden of proof borne by the General Counsel on each allegation, I have no hesitancy in crediting the specific recollection of Nelson over Cross' denial. I therefore find the conversation occurred as described by Nelson. As specifically found *supra*, interrogation of an employee concerning the number of union authorization cards signed violates Section 8(a)(1) of the Act. Paragraph 12(b) of the complaint therefore has merit, and I so find. Paragraph 12(c) of the complaint which alleges similar conduct occurring in October was not supported by the evidence and is therefore dismissed.

### 12. Complaint paragraph 13—Schaeffer tells Boag he was being hired because he was thought antiunion

#### a. *Evidence*

Henry (Hank) Boag, a dealer and alleged discriminatee, testified that in August he approached acting shift manager and personal friend Phil Schaeffer about returning to the Hotel as a dealer. Schaeffer told Boag he would approach Art Hadler, the vice president, on the matter and had Boag fill out an employment application. The following day Schaeffer told Boag by telephone that, while Boag's experience seemed to count against him, when Schaeffer told Hadler that Boag was well respected and totally antiunion, Hadler told Schaeffer to hire Boag immediately. Boag's testimony was uncontradicted as Schaeffer did not testify.[18] Hadler testified that Schaeffer at the time of the alleged events had complete charge over dealer hiring and that he had no conversations with Schaeffer about Boag.

#### b. *Analysis and conclusions*

I credit the testimony of Boag. I do not find, however, that the statements Schaeffer made to Boag about the substance of his conversations with Hadler were accurate. While admissible for the truth of the matter as an admission by a party opponent under Federal Rule of Evidence 801(d)(2)(D), Schaeffer's statements to Boag regarding Hadler's comments to him were credibly denied by Hadler.

Irrespective of the truth of what Schaeffer told Boag, the fact that the statement was made to Boag—i.e., that he had been hired because management believed he was antiunion—inevitably influenced Boag's attitude and conduct regarding the union campaign. The implication that antiunion sympathies are a condition of employment translates without difficulty into an employee belief that management expects antiunion conduct or sympathy from Boag and carries with it the equally unsubtle implication that prounion employees, including Boag should he become one, may find their employment in jeopardy. Accordingly, I find Schaeffer's statement to Boag, despite its lack of truth, violates Section 8(a)(1) of the Act.

[18] Schaeffer was properly served with a subpoena by Respondent but did not appear at the hearing at the appointed time. All parties agreed that no adverse inference should be drawn from Respondent's inability to obtain his testimony.

13. Complaint paragraph 14—Weber threatens Kidd with loss of time off if the Union won the election

a. *Evidence*

Kidd testified that in September he had a conversation alone with Mel Weber, a floorman and schedule man.[19] Kidd "approached" Weber about an extra day off in November. Kidd recalled Weber's response as: "Why don't you wait until after the union election, and we will see." Kidd agreed suggesting that after the election he might no longer be employed. Weber responded Kidd had nothing to worry about. The election was on October 25. Weber did not testify about this conversation.

b. *Analysis and conclusions*

Kidd's testimony was not directly contradicted.[20] Respondent points out, however, the essential improbability of Kidd or any other dealer requesting a day off over a month in advance when scheduling changes are normally accomplished on a shorter term basis. I find, however, that the circumstance is not so improbable as to outweigh the credible testimony of Kidd, especially where that testimony was not contradicted by Weber. Accordingly, I credit Kidd's version of the events. Withholding final judgment on a request by an employee on matters of concern to him until the results of the election are known is a conditional threat and/or promise which carries the clear message that the results of the election will influence management's final decision. Such a condition improperly influences employees in their ballot selection and therefore violates Section 7 of the Act. *"Restaurant Horikawa,"* 260 NLRB 197 (1982).

14. Complaint paragraph 16[21]—Mann threatens Bennett

a. *Evidence*

Current dealer Don Bennett testified that he had a conversation alone with floorman George Mann in mid-September in the pit. Bennett recalled that Mann told him that if the dealers chose the Union things would go bad for them. Bennett responded that he did not wish to discuss the matter. Mann, now a pit boss at the Hotel, testified that he had had several conversations with Bennett in the period, including one in which the possibility of employee loss of benefits was discussed. He denied, however, the exact statements attributed to him by Bennett.

b. *Analysis and conclusions*

I credit Bennett's version of the conversation over that described by Mann. Bennett had a superior recollection and a superior demeanor. Bennett's version more closely matches the phrasing and substance that might have been exchanged by these two individuals in the pit. Given my credibility resolution, I find that Mann's statements improperly associated adverse consequences to employees with unionization, thereby violating Section 8(a)(1) of the Act.

15. Complaint paragraphs 17(a) and (b)—Packe threatens Asaro

a. *Evidence*

Pamela Asaro, a longtime dealer at the Hotel, testified that she had a conversation with then pit manager Anthony (Tony) Packe alone in the keno lounge on October 4. During the course of a social conversation, Asaro raised her fear that dealers would lose health insurance after the election. She recalled that Packe answered that the dealers would not have "insurance or anything, not even tokes" after the election. The conversation continued. One party raised the fact that a group of employees had retained an attorney. A brief argument occurred regarding the merits of selecting an attorney. Packe stated that the only thing the hiring of an attorney would do for the dealers would be to put more "heat" on them. Packe, a shift manager at the time of the hearing, testified that he had had several conversations with Asaro, whom he regarded as a good friend. he also recalled Asaro asked him if dealers would lose insurance coverage if the Union were successful in the election and specifically recalled answering benignly.

b. *Analysis and conclusions*

Considering the allegations of interest or bias regarding each witness and the demeanor of each, I am satisfied both Packe and Asaro honestly testified to their best recollection of the conversation. I credit Asaro over Packe to the extent the two differ, even noting the burden of proof which must be met by the General Counsel. I do so because Asaro recorded her recollection of the conversation the following day and refreshed her recollection by reviewing her notes before testifying. Given my finding of Asaro's honesty and her virtually contemporaneous note taking, I have confidence her memory was the more accurate. Packe, too, testified honestly but he admitted he had neither recorded the conversation nor gave it great weight until the later ripening of the instant litigation. Further, as will be described *infra*, Packe had extensive and ongoing conversations with large numbers of employees during the polygraph examinations at the Hotel and it is simply likely that he could not accurately recall this conversation among many.

Given this factual resolution, I find that the Hotel violated Section 8(a)(1) of the Act when Packe suggested the employees would lose benefits after the election without providing an objective reason other than the simple fact of unionization for the loss. Therefore, I sustain paragraph 17(a) of the complaint. The identical analysis applies as to Packe's remark regarding the attorney for it is clear that the attorney was obtained by an em-

[19] A particular floorman is designated as in charge of scheduling and is involved in arranging and modifying the dealers' work schedule.

[20] Respondent did show that Weber was overtly hostile to Respondent at the time of his testimony and, through evidence of Weber's out-of-court statements on other matters, convinced me that Weber's testimony should be entirely disregarded. I do not under these circumstances draw any adverse inference from the absence of testimony by Weber on the issue.

[21] Par. 15 was dismissed, *supra*, based on my finding that boxmen were not supervisors or agents of the Hotel at relevant times.

ployee group then engaged in protected concerted activity and therefore the threat of adverse consequences based on their choosing a lawyer to assist them would reasonably chill employee Section 7 activities. Therefore, I sustain paragraph 17(b) of the complaint.

16. Complaint paragraph 18—Brown threatens Fitz and others

a. *Evidence*

Fitz testified that floorman Jayson Brown spoke to several dealers in the dealers' room in the Hotel about a week before the election. In the conversation Brown, in Fitz' memory, told the dealers that if the Union were successful management would close the Hotel. Colloquy followed in which Brown asserted his job would not be lost as a result because he was a member of management. While he admitted working with the dealers identified by Fitz, Brown categorically denied the statements attributed to him and further denied having a conversation with dealers regarding the Union or his personal fate in such a circumstance. The other dealers were not called to testify.

b. *Analysis and conclusions*

As noted *supra*, I have found Fitz a persuasive witness. I found Brown nervous and somewhat rigid, generally evincing an unsettled demeanor. I credit Fitz over Brown. Brown's statement about closure is a traditional violation of Section 8(a)(1) of the Act and I so find. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

17. Complaint paragraph 19—improper increases in benefits

a. *Evidence*

On July 21, 1980, by a memo to employees, the Hotel, through Bob Contois, the general manager, announced new or improved benefits to employees, including increased access to Hotel areas and discounts for certain services. James Skaggs, at the time of the hearing corporate director of personnel, testified that in June 1980 he was vice president of personnel and employee relations for the hotel group or division. In that capacity he was involved in reviewing and approving the changes described in the memorandum. He testified that, within the first week of Bob Contois' becoming general manager of the Hotel in early June 1980, the two discussed the items included in the memorandum. Skaggs testified that the memorandum did not issue until July 21 because it was circulated and approved in several draft forms before final issuance. He testified that the changes effected were approved by him by June 15. Skaggs denied any knowledge of union activity at the Hotel as of the time of the memorandum's approval. The representation petition was filed on July 25, 1980. It is clear that management realized in June that it had morale problems with respect to the dealers. Skaggs testified that the benefit increases discussed with Contois were in part designed to address that perceived morale problem.

b. *Analysis and conclusions*

The General Counsel bases his argument for a violation on this aspect of the case on two elements: First, the traditional inference that increases in benefits during an organizational campaign are designed to entice opposition to the Union and, second, the fact that Contois did not testify about the memo or its motivation. While the petition was not filed until July 25, the General Counsel notes that Nelson testified that she informed Respondent through Simons and Skaggs on or about June 24 that she had signed a union authorization card. Respondent argues that the benefits were given to all Hotel employees and were also designed to improve the Hotel's business during slow times. Further, it argues that, as of the time of the initial discussions regarding the memorandum, there was no evidence that Respondent's agents involved in the memorandum's approval knew of employee union activities.

I agree with Respondent and find no violation here. The benefit changes were logical to initiate at the time of Contois' assuming his new position and were put in train within his first week of office before Skaggs or Contois knew of union activity. Given this innocent initiation of the plan to change benefits, Respondent was under no obligation to abandon its decision to increase benefits once it learned of the union campaign. With regard to the timing of the announcement, I am not persuaded that the delay between early June and July 21 is evidence sufficient to rebut the unchallenged testimony of Skaggs that the draft review process occupied the entire period. Respondent on this record did not violate the Act by failing to withdraw or otherwise change the timing of the benefit increases for the election petition had not yet been filed and there was no reason for Respondent to believe that the announcement on July 21 was of particular significance or would necessarily fall hard upon the time of the Union's filing of the petition. Accordingly, I shall dismiss paragraph 19 of the complaint.

D. *The Polygraph Allegations*[22]

The decision to administer polygraph examinations to employees, the actual administration of them and the denial of employee requests for the presence of others during them were all alleged as violative of the Act. The facts and law underlying the issues were extensively litigated by the parties. The contentions of the General Counsel may be grossly summarized as follows. First, the Hotel initiated the polygraph process because of employees' union activities and because of the upcoming election. Second, the Hotel manipulated the polygraph examination process to cause the discharge of known or suspected union supporters. Third, the Hotel wrongfully denied employees the right to the presence of a representative at interviews which they reasonably believed might result in disciplinary action against them. At the risk of some duplication of analysis, it appears appropriate to deal with the various contentions separately.

[22] Additional allegations regarding the denial of the use of an employee appeal system are discussed separately *infra*.

1. Respondent's decision to administer mass polygraph examinations

a. *Background*

Gaming is regulated in Nevada by the Nevada State Gaming Control Board (the Nevada Board). The Hotel operates under a gaming license issued by the State of Nevada and is subject to the oversight of the Nevada Board. During relevant times, the Del E. Webb Corporation made a very significant investment in a hotel and casino in Atlantic City, New Jersey, called the Claridge Hotel, and hoped to obtain a permanent license to operate that facility from the New Jersey Casino Control Commission (the New Jersey Commission). The Claridge had been operating under a temporary permit as of the time of the hearing. The New Jersey licensure process involved a time-consuming and very detailed investigation by the New Jersey Commission into the applicant's qualifications as a casino operator. The investigation included a review of the Del Webb Corporation's operation of its gaming facilities in Nevada, including the Hotel. Thus, at all relevant times the Hotel's gaming operations were under close scrutiny by both the Nevada and New Jersey authorities and this fact was known to the Hotel's managers.

Various witnesses for Respondent testified credibly and without contradiction that, beyond the obvious interest of the Hotel in minimizing dollar losses resulting from gaming fraud and theft, the image or reputation of the Hotel and the Del Webb Corporation as rigorously honest and tightly managed gaming operators was a matter of primary concern to management. It depended on its reputation for honesty and efficiency to retain its licenses to operate in Nevada and to support, or at least not detract from, the Claridge's gaming license application then pending in New Jersey.

The use of polygraph examinations as an investigation tool to uncover suspected cheating is a not uncommon technique in the Nevada state gaming industry and has been utilized both by gaming houses and state regulatory bodies. Polygraph examinations had periodically been required of certain employees at various of the Del E. Webb Corporation's casinos in Nevada, including the Hotel. These occasions usually involved the examination of a small group of employees who were under direct suspicion or who were directly associated with a suspicious transaction or circumstance. Until the instant events, the Hotel did not require general examination of employees nor had large numbers of employees been examined. Respondent's employee rules and regulations make no reference to polygraph examinations.

b. *Events preceding the decision to administer the examinations*

Respondent's management officials and officials of the Nevada Board testified without contradiction regarding a number of suspected fraudulent schemes (scams) in operation at the Hotel's casino in late 1979 and 1980 which resulted in the loss of Hotel money and, in some cases, the contention by the Nevada Board that the Hotel was in violation of Nevada Board regulations regarding its internal gaming controls. Certain of the scams involved the manipulation of the Hotel's gaming credit system so that moneys advanced to customers for gambling were taken from the premises. Credit was sometimes improperly obtained, or obtained under a fictitious name, or credit transactions were irregular with resultant losses to the Hotel.

Investigation into these matters involved the Hotel's use of electronic surveillance equipment installed at the casino and the placement of observers or investigators on the gaming floor, both employees of the Hotel and outsiders, to observe gaming play and credit transactions. One significant scam became known as the "Caputo" matter. The investigation of this situation commenced in late 1979 and proceeded well into 1980. By January 1980 both the Hotel and the Nevada Board were involved in the investigation. A gaming establishment in Nevada is obligated to inform the Nevada Board when it believes gaming irregularities have occurred. Investigations by the Nevada Board are normally conducted in cooperation with the reporting gaming establishment.

In the spring of 1980, Lynn Simons, then the casino manager at the Sahara Reno and the *ad hoc* head of the Hotel's gaming investigation, reported to Doyle Mathia, then president of Del E. Webb's hotel division and vice president of the Del E. Webb Corporation, on the results of the investigation to date. Based on the investigation and Simons' report, Mathia authorized a series of polygraph examinations of employees suspected of wrongdoing, including management officials involved in the Hotel's credit control and cashier clerks. Resignations and terminations followed these proceedings and as a result the Hotel initiated both civil and criminal actions against certain individuals. As a result of these personnel changes, Lynn Simons became acting casino manager in mid-May and Bob Contois was hired as general manager of the Hotel effective June 1, 1980. The Nevada Board's investigation of the scam ended in July 1980. The Nevada Board recommended that a complaint issue against the Hotel for violation of Nevada regulations regarding gaming establishments' internal controls. Such a complaint later was issued against the Hotel. Other scams involving suspected criminal activity were described in detail by various witnesses but the Hotel's dealers were apparently not other than peripherally involved in these occurrences.

During the course of the Hotel's gaming investigations, through various means, Simons came to suspect by May 1980 that a "marker" or credit scam was being perpertrated by pit employees. He reported his suspicions to Mathia and thereafter initiated an investigation of the suspected transactions using outside observers. By July sufficient evidence of irregular gaming procedures, credit transactions, and employee dealings with "suspected outside agents" had been uncovered so that the Hotel felt it necessary to inform the Nevada Board. The Nevada Board initiated its own investigation in late July and secretly reported to Hotel management officials regularly thereafter on the state of its investigation. The investigation focused on suspect activity in the 21 and craps area and involved a wide variety of irregular procedures of

varying degrees of seriousness. By the latter part of September, a Nevada Board official reported to Hotel management that the Nevada Board felt it had sufficient evidence to prosecute certain employees and was therefore seeking arrest warrants for several of the Hotel's staff, including a craps dealer and a 21 dealer as well as a floorman, a boxman, and a pit boss. The Nevada Board told the Hotel the arrests were to be expected in a fortnight.

c. *The September meeting*

A meeting of high management officials of Del E. Webb Corporation and the Hotel, including Respondent's general and labor counsel, occurred soon after the Nevada Board official announced the likelihood of arrests. The purpose of the meeting was to consider and decide upon a course of action for the Hotel and the Del E. Webb Corporation. The discussion was wide ranging and included a review of the series or chain of events discussed *supra*, including the gaming irregularities and their investigation at the Hotel. At this meeting Mathia recited his concern that continued gaming irregularities at the Hotel and Respondent's apparent inability to control them could have an adverse impact on the New Jersey Commission's decision whether to issue a permanent gaming license to Del E. Webb Corporation for operation of the Claridge. Failure to obtain a license for the Claridge would be a major financial disaster for the corporation. Simons suggested that in previous gaming scams in the industry mass terminations of employees had been ordered. Polygraph examinations of gaming employees were raised as an alternative to mass discharges. Previous usage of such tests in the industry was discussed.

Labor counsel Emer noted that the Hotel's upcoming dealer representation election would likely be adversely affected by mass polygraph examinations. There was general agreement that mass polygraph examinations would cause management to lose the election. It was noted, however, that, once arrests planned by the Nevada Board were made and the gaming investigations thus made public, it would be difficult if not impossible for the Hotel to take further action to uncover misconduct because any ongoing illegal conduct by employees would likely be suspended at least temporarily. After substantial discussion Mathia determined to require polygraph examinations of all gaming employees irrespective of the possible adverse impact on the election. The decision was made that all employees who failed the examination or refused to take it would be discharged. Arrangements to give the examinations were commenced soon thereafter. Following the execution of the anticipated arrests at the Hotel in early October, polygraph tests were administered by the Hotel to all gaming employees; i.e., over 500 employees in all positions, from dealers to high officials.

d. *Analysis and conclusions*

Consistent with my rulings at the hearing, I do not deem the accuracy or reliability of polygraph examinations as a means of discovering deception is relevant to the issue of whether or not the Hotel's requirement that dealers take polygraph examinations was violative of the Act. Rather, the issue turns on Respondent's motivation in ordering the polygraph tests. Did Respondent initiate the process for proper or improper reasons? The Board has recently approved a simple statement of a similar issue in a polygraph case. Thus, in *Houston Coca Cola Bottling Co.*, 256 NLRB 520, 526 (1981), the Administrative Law Judge noted:

> [T]here is nothing *per se* unlawful in requiring employees to submit to polygraph tests. See, for example, *Shoppers Dry Mart Inc.*, 226 NLRB 901 (1977); *National Food Service, Inc.*, 196 NLRB 295 (1972). If, on the other hand, such a test is used as a device to permit the discharge, or some other form of disciplinary action of union adherents, thus cloaking a discriminatory motivation, then administering the tests would itself be a violation of the Act, and any consequences resulting therefrom would, in normal circumstances, also be violations.

Counsel for the General Counsel does not challenge the proposition that the Hotel's motive is the issue nor does he suggest the polygraph examinations are *per se* illegal. Rather, he makes two separate arguments. First, he argues that Respondent's motvation for conducting the polygraph tests was entirely based on the election and employees' union and protected concerted activities. Thus, initially, the General Counsel argues that Respondent's claim of a business necessity for requiring the examinations is mere pretext advanced to cloak its true illegal motivation. Second, the General Counsel argues that, even if Respondent's business defense is not found to be pretext, Respondent had dual motivation for directing the examinations which included both illegal considerations and not illegal business reasons. This dual motivation, argues the General Counsel, does not save Respondent from being held to account for the illegal consequences of its tainted examinations.

For reasons discussed in detail *infra*, I reject the argument of the General Counsel that Respondent's asserted reason for conducting the examinations was but pretext. I therefore reject his first argument here. His second argument, the mixed motive theory, is properly analyzed under the Board's *Wright Line* standard established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. in part, enforcement denied on issue of burden of proof, 662 F.2d 899 (1st Cir. 1981). Accordingly, consistent with the Board's analysis, I will consider first the General Counsel's *prima facie* case and then, if necessary, turn to Respondent's defense.

(1) The General Counsel's *prima facie* case

The General Counsel's argument in support of his *prima facie* case has several elements. First, the General Counsel advances the animus reflected in the statements of management alleged in the complaint as violative of Section 8(a)(1) of the Act. To the extent those allegations have been sustained, *supra*, this argument has merit. Second, the General Counsel emphasizes the suspicious timing of the polygraph examinations; i.e., that they commenced in the weeks immediately preceding the election.

Such timing clearly raises a presumption of impermissible motive. Third, the General Counsel notes (1) the large number of employees who were examined and (2) the fact that the bulk of the individuals of whom examinations were required were not directly or even indirectly suspected of misconduct. These circumstances were totally without precedent at the Hotel.

I find that the General Counsel has established a *prima facie* case of wrongful motive. I reach this conclusion without placing significant weight on the evidence of animus contained in the statements found violative of Section 8(a)(1) of the Act, *supra*. Rather, I found persuasive the fact that the Hotel in determining to require polygraph examinations of all gaming employees—over 500 in number—embarked on a very significant course of action involving a substantial commitment of time and resources and with undoubted effect on employees during the runup to the election, all without any even approximately similar past practice. I therefore find that the General Counsel has met his burden of proving his *prima facie* case under *Wright Line* sufficient to support the inference that employees' protected conduct was a motivating factor in the Hotel's decision to administer the polygraph examinations. It is therefore appropriate to turn to Respondent's defense that the examinations would have taken place even in the absence of employee protected conduct because of the overriding business reasons asserted.

(2) Respondent's defense

(a) *The applicable standard of proof*

The Board in *Wright Line* made it clear that once the General Counsel has established his *prima facie* case, noted *supra*, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. Whether the burden which shifts to respondent is (1) the burden of going forward, thus leaving the burden of persuasion on the issue still on the General Counsel, or (2) the burden of persuasion requiring respondent to achieve a preponderance of the evidence on the issue is a sharp academic question which the parties and the courts have addressed at length. The Board's view, as expressed in *Wright Line* and held to date despite the split of opinion in the United States circuit courts of appeals, is that respondent in attempting to meet the General Counsel's *prima facie* case bears the burden of persuasion. Thus, after the General Counsel's *prima facie* case has been made and where the evidence on Respondent's defense does not preponderate in favor of either party, the employer loses. *Atlas Minerals*, 256 NLRB 91 (1981). I am bound to follow Board law until it has been reversed by the Board or the Supreme Court. Accordingly, I shall apply the Board's *Wright Line* standard to Respondent's defense herein.

(b) *Analysis and conclusions*

Respondent's defense may be distilled into two arguments. The first argument is that the Hotel needed to take strong action in the face of continuing gaming irregularities, irrespective of the consequences. Thus, Respondent's financial stake in its New Jersey gaming interests as well as its Nevada gaming interests was so large as to make any other business interests, such as its admitted interest in prevailing in the representation election, pale in comparison. Those financial interests required that Respondent take bold action to convince the regulatory bodies in both New Jersey and Nevada that Respondent was fit to operate gaming establishments in both States. The various and continuing gaming irregularities at the Hotel cost Respondent lost revenues but, more importantly under this theory, threatened to alienate the state gaming regulatory bodies and consequentially threatened to prevent Respondent from obtaining a permanent license to operate its Atlantic City Claridge Hotel and, to some extent, threatened its outstanding gaming licenses in Nevada.

Respondent has supported this argument with both financial evidence and extensive testamentary evidence regarding the gaming regulatory processes and the critical importance to the Del E. Webb Corporation of obtaining and retaining gaming licenses. Respondent supported this objective evidence with testimony from Respondent's highest management officials that, at relevant times, the corporation's license and derivative "reputation" problems were foremost in their minds. The General Counsel did not generally contest the objective evidence of Respondent's financial stake in the regulatory process nor did he significantly weaken the generally unchallenged testimony of Respondent's officials regarding their perceived significance of the problem. I find that Respondent has easily sustained its argument here.

Respondent's second argument is that, given the need for significant action by the Hotel to end gaming irregularities and demonstrate its ability to control its gaming operations, the decision to administer polygraph examinations to its gaming employees and the timing of that decision were not unreasonable under all the circumstances and were designated solely to meet the gaming irregularities and the Hotel's need to bolster its reputation before the regulatory bodies. This argument and Respondent's supporting evidence were closely litigated by the parties.

Respondent argues with vigor that the matters discussed at the late September meeting as shown by the testimony of the participants were both the objective and subjective basis or motivation for the Hotel's taking the decision to administer the examinations. Thus, Hotel management was aware of specific scams involving credit transactions and was further aware of continuing irregular gaming procedures by dealers as uncovered during the investigations of other scams. At the September meeting it was suggested that the Hotel simply cure the situation through the expedience of mass terminations, but polygraph examinations were suggested as a more humane alternative and were ultimately regarded as preferable. Unchallenged testimony, which I credit, establishes that the Hotel's labor counsel pointed out at the September meeting that the administration of mandatory polygraph examinations to all the dealers immediately before the election would likely result in a victory for the Union. This assertion was accepted by the meet-

ing's participants as a foregone conclusion. However, it was determined that, in the larger scheme of things, the union election was simply not a significant factor.

Respondent argues from these facts that the Hotel's decision regarding polygraphs was based purely on business reasons and was wholly independent from considerations of the election or employees' union or protected concerted activities. Rather, argues Respondent, management accepted the proposition that a consequence of the polygraph examinations would be a union election victory. Respondent argues that, while the Hotel did not want the Union to prevail in the election, that question was of small consequence when compared to the unmitigated financial disaster which might befall the Del E. Webb Corporation should the Hotel fail to demonstrate it could reassert control over its gaming operations.

This is a strong and persuasive defense. The General Counsel correctly asserts, however, that Respondent's arguments must be viewed in the context of events. Thus, the suspicious timing and animus evidence noted, *supra*, as part of the General Counsel's *prima facie* case must be weighed in the analysis. The General Counsel also makes several specific attacks on Respondent's defense. First, the General Counsel argues that the "irregularities" which allegedly formed the basis for Respondent's decision to initiate the examinations were "rooted in paperwork transactions" rather than in dealer conduct and therefore dealers were not prime suspects in the various credit scams which had occurred up until September. Second, he argues that the admitted fact that a series of "scams" had occurred over a considerable period of months without mass polygraph examinations having being previously ordered is highly relevant in deciding if the final decision to administer mass examinations was based on other than "business reasons." Thus, the General Counsel argues, why did Respondent wait until just before the election? The General Counsel argues further that the procedures of the examination process, described in detail *infra*, are evidence that the true reason for the examinations was not related to uncovering misconduct by employees but was rather designed to punish union supporters.

I have carefully considered the business justification defense of Respondent and the General Counsel's attack upon it. Specifically assigning the burden of persuasion to Respondent, I am satisfied that it has met the General Counsel's *prima facie* case on this issue. Thus, I find that Respondent would have required the polygraph examinations of its gaming employees even had the dealers not then been involved in a union election campaign or in union and other protected concerted activity. I so find because I accept the proposition asserted by Respondent that it felt the continuing gaming irregularities at the Hotel threatened its important financial interests in New Jersey and Nevada and that it believed that a major public housecleaning effort must be undertaken to reestablish its reputation with the gaming regulatory commissions. I also note that examinations were required of all gaming employees and exposed supervision to the same risk of an adverse result as other employees. Apparently, all who were unable to successfully pass an examination were, without exception, discharged.

I do not reject the General Counsel's arguments on the issue so much as I discount their effectiveness against my finding that Respondent acted because of its perception of extraordinary financial risk. It is true the dealers were not necessarily more than spectators to the bulk of suspected gaming irregularities. It is also true that the number of polygraph examinations administered went far beyond anything previously undertaken at the Hotel. It is true that until late September, with the election but weeks away, the scams had not precipitated the action ultimately taken by the Hotel. Accepting these propositions and noting the other suspicious circumstances raised by the General Counsel's evidence, I nevertheless find that for Respondent's management the upcoming arrests announced by the Nevada Board, in the context of the Hotel's apparent continuing inability to avoid gaming irregularities and attendant adverse publicity, precipitated a decision to undertake a bold, and, indeed, perhaps deliberately cathartic, course of action which would convey to the gaming regulatory bodies, the public, and employees the message that management was going to take immediate and aggressive action to reassert control over its gaming operations. In this context, the General Counsel's argument that the ordering of widespread polygraph examinations was out of all proportion to the problems encountered among dealers loses most of its force. Respondent clearly wished to demonstrate its vigor and willingness to use stern measures in addressing gaming irregularities. For it draconian edicts served an independent purpose beyond eliminating gaming irregularities. Respondent believed it needed to create the appearance of vigorous action as well as take the action itself.

My findings herein include the acceptance of Respondent's argument that in the larger context the union election was of little significance when compared to the perceived financial threat inherent in its loss of Nevada gaming licenses or its failure to obtain a permanent license at the Claridge in New Jersey. I have specifically credited management testimony regarding the discussion of these subjects at the September meeting. Given this factual resolution, there is substantial, essentially uncontradicted evidence that Respondent's managers did in fact have the financial issues foremost in their mind and further specifically believed, but ignored the fact, that the polygraph examinations would produce an election victory for the Union.[23] Given all the above, I find Respondent has successfully met its burden of proof on its defense, even given the validity of the General Counsel's *prima facie* case as to the polygraph examinations. Accordingly, I find no violation of the Act and I shall therefore dismiss this element of the complaint.

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[23] The General Counsel argues that by late September Respondent knew it had lost the election and was therefore intent on punishing the unit employees generally and union supporters in particular by means of the polygraph examinations. As is discussed in greater detail, *infra*, there is insufficient evidence to support this argument and I find it unpersuasive in light of the credited testimony regarding the September management meeting.

2. Respondent's administration of the polygraph examinations

a. *Facts*

Respondent organized a team of experienced polygraph examination administrators and set up virtually an assembly line process for examining some 565 gaming employees of whom some 85 to 90 percent were dealers. As discussed in greater detail *infra*, employees were first brought to an office where Hotel management officials explained the examination procedures and, during the earlier portion of the examination process, obtained the examinee's signature on a waiver form. These meetings were generally standard in format and were openly tape-recorded. If all necessary steps were accomplished, the employee and the polygraph examination administrator met in a smaller adjacent room alone where the examination was explained and administered. After the examination was concluded, the examinee was again brought before the management group. If the test results were satisfactory, the examinee was congratulated and released. Those who did not pass their examination had additional discussions with management as will be discussed in greater detail *infra*. Those who were terminated were sent to a separate area where an agent from the personnel department consummated their termination process. Thereafter, the employees were escorted from the premises by a guard and were told not to return to the Hotel without management permission.

Questions of examinee medication were handled either in the initial management interview or at the actual examination stage. Apparently, some medications prevented immediate examination; others were regarded as benign. No applicant was allowed to take the examination without first signing the proffered waiver form. Those who initially refused to sign were in some cases given time to reconsider their position. In all cases, those who ultimately refused to sign an unmodified waiver were terminated as were all those who ultimately failed to pass a polygraph examination. Among nondealers directed to be examined, nine failed the examination and three did not take it. Of dealer employees, nine failed the examination and eight did not take it. All were terminated. The 17 terminated dealers are at issue here.

b. *Analysis and conclusions*

I have found that Respondent had no impermissible motivation in requiring employees to take polygraph examinations. It follows therefore that those who failed a properly conducted examination[24] could be properly discharged. *Houston Coca Cola Bottling Co., supra.* Similarly, the Board has held that those who refuse to take a properly required polygraph examination may also be discharged. *7-Eleven Food Store*, 242 NLRB 104 (1979). The General Counsel contends that, even given an innocent decision by Respondent to conduct polygraph examinations, the actual examination process was manipulated to cause the termination of known or suspected union adherents. The General Counsel's argument goes to two stages in the examination process: (1) the waiver stage and (2) the actual polygraph examination.

Dealing first with the actual examination process, there was no evidence offered that the polygraph examination results, which were proclaimed "failures" by the examiners, were the result of other than standard polygraph examination administration and result interpretation. Thus, there was no argument made or convincing evidence offered that the examination administration and result interpretation process was manipulated. There was some evidence of variance among employees regarding: (1) the amount of time allowed to consider signing the preexamination waiver form; (2) the provision of an opportunity to consult with a physician regarding medications used and their effect on the examination process; and (3) providing employees an opportunity to retake the examination after receiving an initial inconclusive or adverse result.[25] There was, however, insufficient evidence to find that union supporters were discriminated against in the actual examination process.

The General Counsel's argument on this aspect of his case fails for several reasons. First, the noted variations which occurred during the processing of employees were not unusual given the large number of examinees, the various agents of management involved, and the period of time over which the examinations were conducted. The record is not sufficiently complete with regard to the various medical questions posed by employees to suggest that identical medical situations were handled differently by the same management officials in order to harm union supporters. Second, and more importantly, the variations which occurred as often as not favored known union supporters such as Nelson, or occurred among examinees as to whom Respondent would have no basis or motive to discriminate. Some had unknown union sympathies, others were of equal apparent union sympathy. Lastly, there is no evidence the polygraph examiners shared management's knowledge, if any, of given employees' union sympathies.

Turning to the waiver issue, Respondent required each potential examinee to sign a waiver form which stated, *inter alia*, that the employee was taking the examination of his or her own free will. Respondent allowed no addition, modification, or comment on the waiver form. The Hotel refused to administer the examination to employees who refused to sign the waiver and terminated those who would not take the examination. The General Counsel argues the obvious incongruity in requiring employees, who have been told they must take a polygraph examination or be terminated, to sign a form which recites

[24] At the hearing I refused to hear any evidence regarding the scientific efficacy or value of a polygraph examination in determining the truth or lack of truth of an examinee's statements. By a properly or regularly conducted polygraph examination, I here refer only to the conformity or lack thereof of a given examination to standard polygraph procedures. Thus, the issue here is not whether the examination produces a valid result but rather whether the examination was in fact a regular polygraph examination the results of which were interpreted in a regular manner consistent with normal polygraph procedures and not a predetermined pretext for a concealed desire to fire a particular employee or employees because of known or suspected union activities.

[25] Neither the appeal denial allegations or witness request allegations of the complaint are addressed here. See separate discussion *infra*.

that they are taking the examination of their own free will. The General Counsel argues that this incongruity: (1) is evidence of the unlawful motivation of the Hotel in conducting the examinations, a factor considered but rejected *supra*, and (2) is evidence that Respondent used the waiver form as a means within the examination process to discriminate against prounion employees.

There was no evidence that the decision to require a waiver or its use as a contract of adhesion was initiated by Respondent out of guilty motive. Rather, it was required by the Hotel because it was required by the polygraph examiners in an apparent effort to reduce any potential personal liability which might result from administering the examinations to employees. There was uncontradicted testimony on this point which I credit. Thus, I find that there was no improper motivation by Respondent or its agents in the use of the waiver form or in the consequential termination of those who would not sign such an unmodified form. Further, all employees were given the same rigid choice irrespective of their known or suspected union sympathies.[26] Given the lack of improper motivation in requiring the waiver or improper manipulation of the requirement among the various employees asked to take the examination, it is unnecessary to comment further on the inherent unfairness or absurdity of the procedure. Employers have the right to be both unfair and absurd under the Act if that conduct is free from other considerations prohibited by the Act.

In summary, and disregarding the witness request and appeal issues dealt with *infra*, I have found that the examinations, including the preexamination interviews and waiver signing, were not conducted in a manner which was designed to or in fact did discriminate between employees because of their known or suspected union activity or for other impermissible reasons. I shall therefore dismiss this portion of the General Counsel's complaint.

### E. *Allegations Regarding Employee Requests for Representation*

The General Counsel alleges that each of the employees named in paragraphs 22, 23, and 24 of the complaint[27] requested and was denied the opportunity to have a representative present during an interview with Respondent's agents which the employee had reasonable cause to believe would result in disciplinary action. The facts concerning the general nature of the interview and examination process are not in significant dispute and have been briefly described *supra*. The individual meetings and what was said by the participants regarding representation were disputed and were closely litigated. It seems appropriate to first describe the examination process generally, then to address the individual meetings, and, finally, to turn to the general legal principles regarding employee rights as they apply herein.

#### 1. The general format of the examination process

With few apparent exceptions, employees were summoned to the interview and examination areas and, one by one, brought into an interview room. Present in the room were two or three management representatives, usually Packe and Simons or Hadler. One management representative explained to the employee why he or she was there and, using prepared notes or in any case a standard routine, explained to the employee his or her rights. The employee was asked if he or she had engaged in illegal gaming activity at the Hotel or knew of others who had. Employees generally denied any knowledge of wrongdoing. The employee was then asked if he or she would take a polygraph examination and, in the earlier sessions, was asked to sign a waiver form. In later sessions the examiner was given responsibility for obtaining employee signatures on the waiver forms. If raised, it was made clear that the waiver form must be signed before the examination could take place and that the employee must take and pass the examination to remain employed. If the employee failed to sign the waiver or refused to take the exam he or she was ultimately terminated. At the end of the initial interview the employee who cooperated was then ushered into a separate room and met with the polygraph examiner alone.

At that stage of the process the examiner explained his procedures, discussed problems or answered the employee's questions, reviewed the test questions, and finally conducted the examination. When the test was concluded, the examiner reported the results to the management team. The employee was taken from the examining room to the interview room and, depending on the examination results, congratulated on passing the exam or braced with failure by the management team. Successful employees were then allowed to leave. Unsuccessful employees were told they had lied, were told they were guilty of misconduct or the withholding of information, and were urged to rehabilitate themselves. With some variety, unsuccessful examinees were terminated at that point. Others who confessed to certain minor misdeeds were allowed to retake the examination with the new examination's questions fitted to the new admissions made. All terminated employees were passed on to a personnel officer who processed the necessary termination papers. The employees were told not to return to the facility without permission and were escorted off the premises.

All employee requests for the presence or assistance of another at the interview or at the examination were

[26] Like the medical issues discussed *supra*, there was evidence of variation in the amount of time allowed employees to reconsider their initial refusal to sign the waiver form by Respondent's agents. Like the examination procedure discussed *supra*, I find no improper pattern other than random variation or reaction to different situations by various of Respondent's agents in this regard. Nelson and Griffith, for example, were given perhaps greater leeway in considering signing the form than other employees. Each was a notorious union supporter.

[27] In par. 25 of the complaint the General Counsel alleged the constructive denial of a request for a representative made by employee Jerry B. Simpson. Employee McAteer was originally included in par. 25, but was deleted by oral amendment at the hearing. Simpson testified he did not ask to have a representative present because of his belief that the request would cause the Hotel to retaliate against him. He also testified that his fears were based on conversations he had with other dealers about the polygraph process. I granted the motion of Respondent to dismiss par. 25 of the complaint at the hearing after the General Counsel rested his case. I reaffirm that ruling here. If the concept of a constructive denial of the right to the presence of a representative exists in law, it was not perfected here because Simpson's fears were based on conversations with employees which were not attributable to Respondent.

denied. At no time at any stage in the process did Respondent accede to any request for a witness, representative, coworker, attorney, or other person to assist or act as witness for the employee.

2. Individual employee interviews

The key element litigated in each conversation between employee and management was the circumstances and specifics of any employee's request for representation. Therefore, to the extent necessary to supply the context in each instance, (1) relevant background events, (2) the interview of the employee by the Hotel's interview team, (3) the polygraph examination, and (4) the postexamination management interview are discussed below for each contested employee.

a. *George Ebersole*

(1) Evidence

Early in October, craps dealer George Ebersole consulted with Mike Harrison, an attorney retained by an employee group to advise them on the matters then in controversy at the Hotel. He was summoned to his polygraph interview and examination on October 6 or 7. He met with Lynn Simons, Art Hadler, and Rick Romo. What occurred was disputed. Ebersole and Simons testified about the conversation that ensued. Ebersole recalled an initial colloquy about management's tape recorder and his own recording device followed by a request that he sign two pieces of paper. Ebersole testified on direct examination that he then asked for the presence of an attorney and, when that was denied, he asked "to have a witness present, either a fellow employee or another witness to the questioning and lie detector examination." On cross-examination, Ebersole admitted that he could not recall using the words "fellow employee," "co-worker," or "employee" in the interview. Whatever his request, it was denied. Simons testified that Ebersole asked only for an attorney to be present to advise him on the waiver form and to be present during the polygraph examination. Simons recalled Ebersole's request was denied. Ebersole declined to sign the waiver form under these circumstances and was terminated without taking the examination.

(2) Resolution

On the conflict between the versions of Simons and Ebersole regarding Ebersole's request for a witness other than an attorney, I credit Simons over Ebersole. I do so largely on the basis of demeanor for I found Simons a consistent witness with an apparently forthcoming manner. Ebersole's version of events differed in important ways between his direct and cross-examinations. Further, while not conclusive, Ebersole's version of the format of the interview is at variance with the testimony of other witnesses. Given all the above, I find that Ebersole only requested that an attorney be present at his interview and polygraph examination—a request which was denied by management. I find he requested no other individual be present.

b. *Jesse Henson*

(1) Evidence

Jesse Henson was interviewed by Simons and Packe on October 11, just before his polygraph examination. He failed to pass the examination and was terminated. His personnel record bears the entry "Failed polygraph regarding alleged gaming irregularities."

Jesse Henson died before the hearing commenced. Counsel for the General Counsel offered portions of two affidavits of Henson's taken by Board personnel as substantive evidence of what occurred at Jesse Henson's prepolygraph interview. The first affidavit, taken soon after the event, recites the conversation of the interview in apparent entirety. The second affidavit, taken months later, adds additional remarks to the earlier recitation of the interview. It includes a statement by Henson to his interviewers at the commencement of the interview: "Aren't we supposed to have legal advice?" Respondent called and examined the two Board agents who prepared the affidavits during meetings with Henson regarding the circumstances of the affidavits' preparation.

Simons testified about the polygraph interview with Henson and Respondent introduced into evidence a transcript of a tape recording of the conversation. The General Counsel was afforded an opportunity to listen to the original tape recording and compare it against the transcript offered into evidence. The General Counsel refused to stipulate to the conformity of the transcript to the tape but did not otherwise attack the transcript's admissibility. I received it over his and the Charging Party's objection. Simons testified that no statement was ever made by Henson in the interview about "legal advice," nor did Henson make any other request for a representative. The transcript is consistent with this testimony.

(2) Resolution

(a) *The admissibility of the affidavits*

The Henson affidavits are hearsay. Henson was of course unavailable to testify at the hearing. The General Counsel offered the affidavits under the hearsay exception contained in Federal Rules of Evidence (FRE) 804(b)(5) which provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules

> and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Respondent opposed the proffer arguing, *inter alia*, that Respondent had not received the required notice under the proviso of FRE 804(b)(5)(C) and, further, that the affidavits did not have sufficient "circumstantial guarantees of trustworthiness" to justify their receipt into evidence. I received the affidavits subject to their being rejected, on motion of Respondent, if it was denied the opportunity to call and examine the Board agents who took the affidavits by means of the General Counsel's failure to agree to make the witnesses available as required by the Board's Rules and Regulations, Section 102.118. Since the Board agents testified, that conditional portion of my ruling was not challenged. Given that fact, I reaffirm my receipt of the affidavits into evidence.

The Board has received the affidavits of unavailable individuals pursuant to FRE 804(b)(5) in previous cases; e.g., *Justak Brothers & Co.*, 253 NLRB 1054 (1981), enfd. 664 F.2d 1074 (7th Cir. 1981); *Central Freight Lines*, 250 NLRB 435 (1980), enforcement denied in relevant part 653 F.2d 1023 (5th Cir. 1981). The Seventh Circuit in *Justak* found the necessary "equivalent guarantees of trustworthiness" in the fact that the affidavit in that case was given under oath and penalty of perjury. The Fifth Circuit in *Central* found the affidavit in that case, which was signed rather than sworn, lacked sufficient guarantees or trustworthiness and rejected it as not qualifying under FRE 804(b)(5). The Board decisions in *Justak* and *Central* do not draw any distinction between a signed and a sworn statement. The affidavits at issue herein were both signed and sworn. Further, the testimony of the two Board agents regarding the close communication and interrogation which occurred during the preparation of the affidavits supports a finding, which I make, that the affidavits reflect the statements of Henson and are not likely misstated through less than diligent preparation.

Turning to Respondent's argument as to notice, it is true that counsel for the General Counsel did not inform counsel for Respondent of the existence and specifics of the affidavits or of the General Counsel's intention to offer them into evidence until the morning of the third day of the first week of the hearing, which was the day following counsel for the General Counsel Ball's confirmation of the fact of Henson's death. It is also true that agents of the General Counsel other than Ball had been informed earlier in the month that Henson was dead and that they had not informed counsel for Respondent of the General Counsel's intention to offer the affidavits. Nevertheless, counsel for Respondent had ample time to prepare to meet the evidence in the affidavits during the remaining 13 days of hearing which occupied 2 calendar months, and, as noted *infra*, he did so with great success. Thus, whether or not the passage of time after the General Counsel's agents learned of Henson's death may be charged to counsel for the General Counsel Ball in his management of litigation, Respondent was not injured in any way by the delay, if any, in being notified of the Government's intentions regarding the Henson affidavits. Turning to the requirement of FRE 804(b)(5)(B), inasmuch as Henson was the only individual not an agent of management at the meeting, it is clear that the General Counsel could not procure any more probative evidence on the subject than the affidavits. Accordingly, I find that all the requirements of FRE 804(b)(5) were met by the General Counsel in making his tender of the affidavits as substantive evidence. Therefore, the affidavits were properly received as substantive evidence under FRE 804(b)(5).[28]

(b) *Conclusions*

Considering the affidavits, the testimony of Simons, and the transcript of the tape recording, I am convinced that Henson made no request for the presence or assistance of any witness, representative, or attorney. I discredit the assertion in Henson's second affidavit that he asked about legal advice. On this record I assign greater weight to the credible testimony of Simons corroborated by the transcript as opposed to the essentially afterthought addition to the conversation contained in Henson's second affidavit. Accordingly, I find Jesse Henson made no request for a representative of any kind.

c. *Vernon Johnson*

Vernon Johnson met with Art Hadler and Lynn Simons on October 4 for his prepolygraph interview. Without reading aloud from the paper he had with him, he presented it to his interviewers and indicated it should be the basis on which they would proceed. The paper had numerous numbered paragraphs, the first of which requested the presence of a "representative (another dealer)."[29] The second paragraph requested or asked to have his attorney present. Management told Johnson they would not accede to his request and after considerable colloquy regarding whether he was refusing to take

[28] Although not at issue at the hearing, I also reaffirm my conditional receipt of the evidence. Whenever an affidavit tendered by the General Counsel under FRE 804(b)(5) was taken by a Board agent, respondent must obtain the permission of the General Counsel to obtain the testimony of the Board agent who took the affidavit under the Board's Rules and Regulations, Sec. 102.118. Were the General Counsel to deny a respondent the right to call and examine a Board agent concerning an affidavit offered by the General Counsel, respondent would be deprived of its only opportunity to delve into the circumstances of the affidavit's preparation. If the General Counsel seeks to obtain the advantages of an affidavit prepared by his own agents and offered pursuant to FRE 804(b)(5), he must not restrict respondent's legitimate inquiry into the circumstances of the affidavit's preparation. Accordingly, I hold it is proper and indeed necessary to hold that a Board-prepared affidavit is admissible under FRE 804(b)(5) only if the General Counsel does not block respondent from obtaining relevant testimony about the affidavit from Board agents pursuant to the Board's Rules and Regulations, Sec. 102.118.

[29] There was some dispute regarding which of two similarly worded papers were used. One version reguested a "witness (another dealer)," the second requested a "representative (another dealer)." As to these two versions, the differences are immaterial.

the polygraph test sent him home. Later, Armstrong contacted Johnson and told him the Hotel wanted him to sign some papers and take the polygraph exam. Johnson insisted he be able to bring his attorney, which request was denied. He did not take the exam and was therefore terminated. His personnel record contains the entry "Term. Failed to cooperate in investigation."

d. *Hank Boag*

(1) Evidence

Hank Boag had his prepolygraph interview with Packe, Hadler, and another individual on October 10. Boag testified that during the interview, when asked to take the polygraph examination, he replied, "Yes, but in lieu of what had happened in the past, I would like a witness present." Packe recalled that Boag asked for the presence of an attorney. No other witness testified regarding the disputed testimony nor was a tape recording or a transcript of a tape recording of the meeting offered. Respondent would not comply with Boag's request and Boag was terminated. His personnel record indicates he was terminated for refusing to cooperate in the investigation.

(2) Resolution

As noted *supra*, I have credited other testimony of Boag. I do so here. First, Hadler testified about other matters but did not corroborate Packe on the issue in dispute here. An adverse inference as to Hadler's testimony is appropriate and I draw it.[30] Second, Boag evinced a clear recollection, rather tenaciously defended during cross-examination, as to his exact request which was unshaken throughout his testimony. His demeanor was impressive. Lastly, Packe, a participant in hundreds of interviews, cannot be as likely to recall exactly each conversation as would Boag who had but one such meeting. Accordingly, I find that Boag asked for a witness to be present during his polygraph examination.

e. *Deanne Ball Griffith*

(1) Evidence

Deanne Ball Griffith had a prepolygraph interview with Packe and Simons on October 15. Griffith testified that at the commencement of the meeting she asked for the presence of a "representative." When the request was deined she asked for her attorney. This request too was denied. Packe testified that Griffith asked only for an attorney, not for a representative. After her request(s) and the denial(s), a lengthy colloquy ensued regarding the waiver form and its implications. Griffith would not sign the form without more time. Ultimately, Griffith was given until the next day to determine if she would sign the form and she left. The following day she returned to the examining area and had a conversation with polygraph examiner Russ Jones regarding the waiver. He told her the waiver form was his own, not the Hotel's. Jones testified that Griffith objected to the waiver and further asked for the presence of an attorney. Jones answered that he never allowed third parties in the examination room during an examination. Ultimately, Griffith refused Jones' request to sign the waiver form and, when this fact was reported to management, she was discharged. Her personnel record notes she was terminated because she "refused to cooperate in investigation."

(2) Resolution

It is clear that Griffith in her meeting with Jones asked for the presence of an attorney only. Regarding what was said in her initial interview, Griffith's testimony concerning her request for a representative is at direct variance with Packe's testimony. Simons did not testify regarding this interview and I draw an inference that, had he testified regarding the substance of the interview, his testimony would have been adverse to Respondent. As between Packe and Griffith on the issue, I credit Griffith. I believe it more likely Griffith would have requested both a representative and an attorney because of the position the committee and committee counsel Harrison were taking with regard to the polygraph process. See, for example, the written instructions supplied to employee Johnson noted *supra*. As to this conversation Griffith's demeanor was superior although her testimony was weakened by the existence of multiple affidavits, as noted *supra*. Further, I am convinced that Griffith would better recall what she said in the interview than Packe who was not necessarily able to separate specifics of each interview or able to recall with specificity what was said in each. Lastly, not only was Packe not corroborated by Simons, but Respondent did not offer into evidence either the tape recording or a transcript of the tape recording of what was said at the meeting. Accordingly, based on all of the above, but primarily on the relative demeanor of the witnesses, I find that Griffith did in fact request a representative at her prepolygraph interview with Hotel management.

f. *Wanda Jeffords*

Wanda Jeffords met with Packe, Hadler, and Simons in her preexamination interview on October 18. There is no dispute that she requested the presence of neither an attorney nor a representative in that meeting or in her meeting with the polygraph examiner. In the polygraph room she refused to sign the waiver proffered her and was returned to the interview office. There, she testified, she told her interviewer that she did not understand the waiver form and added "didn't I get a lawyer." Packe testified Jeffords at no time made a request for a lawyer. A transcript of the tape recording of the meetings corroborates Packe. I credit Packe and find the request as testified to by Jeffords was not made.

g. *Gloria Nelson*

(1) Evidence

Nelson testified that on October 10 she had a prepolygraph interview with Packe, Hadler, and another indi-

[30] The General Counsel also requested an adverse inference be drawn from the failure of Respondent to introduce the tape or transcript of this conversation. In light of the credibility resolution made I find it is unnecessary to do so. Were it material to the result, I would draw the inference suggested by the General Counsel.

vidual. Packe followed the standard interview format. Nelson recalled that, when he presented the waiver form to her, she asked if she could have a representative present. Packe said no. Packe testified that he did not recall a request by Nelson for a representative but recalled her request for the presence of an attorney, which request management declined.

Nelson's initial session ended without further discussion because of the existence of certain issues regarding her use of medication. On November 18 she was summoned again to the examination area by Mel Weber. Nelson testified she asked Weber if she could "have somebody go with me, another dealer?" Weber said no. Weber testified he could not recall if a conversation occurred as testified to by Nelson. Nelson then met with polygraph examiner Alpin. He testified that Nelson asked that an attorney be present but did not otherwise request of him the presence of a representative. All requests were denied. Ultimately, Nelson refused to sign the waiver without modification and was discharged. Her personnel records contain the entry, "Terminated, refused to cooperate in investigation."

(2) Resolution

I have discussed Nelson's superior credibility *supra*. I credit her here. Neither Packe nor Weber, who was not a credible witness, did other than deny recalling the statements Nelson claimed she made. Such denials while not oblique are less than absolute. Accordingly, based on both relative demeanor and the denials which I discount, I credit Nelson. I also credit Alpin whom Nelson did not contradict in material part.

3. Analysis and conclusions

a. *General principles*

In *NLRB v. J. Weingarten*, 420 U.S. 251 (1974), the Supreme Court held that an employer violates Section 8(a)(1) of the Act when it denies an employee's request that a union representative be present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The Board has explicitly determined that such *Weingarten* rights flow from the Section 7 right of employees to engage in concerted activity for mutual aid or protection. Thus, they are not dependent on the fact that a given employee is represented by a union where the requested individual is a fellow employee. *Material Research Corp.*, 262 NLRB 1010 (1982). *Weingarten* rights also exist in disciplinary interviews if the interviews are not conducted for the exclusive purpose of simply notifying an employee of previously determined discipline. *Baton Rouge Water Works*, 246 NLRB 995, 997 (1979).

The General Counsel asserts that it is "arguable" that an employee request for the presence of an attorney raises *Weingarten* rights. There are two arguments supporting this position, one general and the other specific relying on the particular facts of this case. The specific argument that the requested attorney herein may have been known by management to be a labor organization representative is discussed *infra*. The argument addressed here is the General Counsel's asserted proposition that, since any individual may perform a supportive function, e.g., act as a witness for an employee in a *Weingarten* interview, under the Board's analysis of *Weingarten* rights in *Materials Research Corp., supra*, then a request for any individual, including a lawyer, raises *Weingarten* entitlements.

I reject the proposition that an employee may request the presence of any person, including his personal lawyer, and thus invoke *Weingarten* rights. The analytical concept of "mutual aid and assistance" has been held to apply to the situation where one individual helps another in order to increase the likelihood he will later obtain assistance when he is in need. Such mutual aid is useful and necessary in cases where employees act to achieve "solidarity." The analytical construct matches reality. Similarly, an employee who requests the presence of a coworker or a union representative at a disciplinary meeting is also clearly acting in this spirit of mutual aid and protection. All will stand together. An employee who requests the presence of his personal lawyer, however, is not invoking the support of the lawyer as part of a common cause with others. The lawyer is for his personal assistance. He does not contemplate later assisting the lawyer in his need. The employee is therefore seeking personal assistance for his own cause and no other. Such activity is not for mutual aid or protection within the analysis of *Materials Research Corp., supra*, or the cases cited therein. Such a request is therefore not protected under the Act. Accordingly, I do not find a request for the presence of one's personal lawyer raises *Weingarten* rights.

To invoke the protections of *Weingarten* an employee must make a clear request of management for proper accompaniment during the interview. Respondent notes that in *Party Cookies*, 237 NLRB 612 (1978), an employee asked the employer if he should have a union steward present and the employer answered "not to my knowledge." The Board found in that case that no specific request for representation occurred sufficient to raise *Weingarten* rights. See also *Spartan Stores*, 235 NLRB 522 (1978), affd. 628 F.2d 953 (6th Cir. 1980); *United Telephone Co. of Florida*, 251 NLRB 510 (1980).

One of the necessary circumstances to raise *Weingarten* rights is an investigatory or disciplinary interview which involves a confrontation between management and the employee. The meeting may not be merely for the issuance or communication of previously determined discipline. Further, the employee must reasonably believe that discipline for past misconduct may result from the interview. In *Postal Service*, 252 NLRB 61 (1980), the Board determined that an employer-ordered doctor's examination of an employee who had absentee problems was outside the purview of *Weingarten*. The Board found that no questions of an investigatory nature were asked of the employee during the doctor's examination and that there was insufficient evidence to establish that the examination was intended by management to form the basis for taking disciplinary or other job-related action against the employee because of past misconduct.

Given these general principles it is appropriate to turn to the specific facts of this case and determine how these

principles should be applied to the interviews held by the Hotel.

b. *Did the polygraph process include meetings of a kind sufficient to raise Weingarten rights*[31]

Respondent argues that no *Weingarten* meetings occurred during the polygraph examinations. Its arguments on the issue must be resolved before addressing the situations of each individual employee. There were three stages of the polygraph examination process: the preexamination interview, the polygraph examination administration, which itself has several parts, and the postexamination interview. Each must be separately analyzed.

(1) The preexamination interview

At this stage of the process, employees were brought before a group of management agents and were asked if they had stolen from the Hotel, engaged in other improper conduct, or knew of others who had engaged in misconduct. There seems to be no dispute that this stage of the polygraph examination process meets the *Weingarten* criteria for a disciplinary interview at which an employee reasonably expects discipline might result. I so find.

(2) The polygraph examination

The polygraph examination involved several stages. Initially, the examiner greeted the examinee, explained his equipment and its operation, discussed the procedure and goals of the examination, and, in later cases, obtained the written consent of the employee on a waiver form. As part of this familarizing process the employee and the examiner discussed the examinee's physical condition and medical history, if relevant, and then reviewed the general questions that would be asked the examinee so the examiner could tailor specific questions to the particular needs and circumstances of each examinee. The examination was then undertaken. If problems developed particular stages of the process would be repeated as necessary. Finally, the results of the examination were reviewed and reported by the examiner.

Clearly, the employees reasonably feared discipline based upon the results of the actual polygraph examination. Respondent, however, raises several arguments against a determination that a polygraph examination is a disciplinary interview within the meaning of *Weingarten*. First, Respondent characterizes the process as one solely designed to ascertain the truth of employee responses to a set of preordained questions. Thus, in Respondent's argument, the interviewee merely gives a series of yes or no answers to the questions asked. This, Respondent argues, is not the type of "confrontation" contemplated by the Supreme Court in *Weingarten* or by the Board in later cases. Respondent advances the Board's holding in *Postal Service, supra*, as applicable here. Second, Respondent argues that a polygraph examination is essentially impossible when conducted in the presence of a third party and, therefore, to allow a witness to be present is, in essence, to prohibit employers from using polygraph examinations at all. Since the Board allows properly motivated polygraph examinations, Respondent argues, *Weingarten* should not be interpreted in such a way as to deny employers the right to administer polygraph examinations.

I find the facts of *Postal Service* clearly distinguishable from those extant in the polygraph examination process herein. First, the polygraph process was conducted solely to uncover evidence of previous employee misconduct. Unlike the physical examination in *Postal Service* the information gleaned had no benign aspect. If an employee failed his or her examination, he or she was fired—uncovering misconduct was the sole purpose of the examination. I also reject Respondent's analogy of the polygraph procedures to objective and nonconfrontational processes akin to a simple measurement process such as the taking of fingerprints or a blood sample. Howsoever objective the polygraph results and howsoever objective the polygrapher's analysis of the results, it is clear that the test results are critically affected by what questions are asked the examinee. The questions are not standard but are custom fitted to each examinee. The crafting of the specific questions by the examiner results from dialogue between the examinee and examiner. These preexamination statements of the examinee are therefore critical to the proceeding and its ultimate result. The tailoring of these questions thus involves the participation of the examinee in a manner much like the participation required of an employee at a "normal" disciplinary or investigatory interview. Such an employee may well benefit from the assistance of another during the exchange. Accordingly, I find *Weingarten* rights apply to the polygraph examination involved herein.

Respondent's argument that requiring a witness to be present at a polygraph examination would totally destroy the process is separate from its argument that no *Weingarten* rights are in issue. There is merit in Respondent's argument that *Weingarten* and subsequent cases have attempted to balance the conflicting interests of the parties and have sought to seek a reasonable accommodation between those interests. Respondent is also correct when it asserts on brief that "no attempt to make such accommodation was made in the instant case." I put the burden on Respondent, however, to have suggested accommodations to employees which would have substituted for the presence of a third person at the examination. It is clear Respondent did not do so. Respondent uniformly and vigorously denied employees the right to accompaniment by anyone and everyone—rejecting a variety of requests, as discussed *supra*, at each and every stage of the process, i.e., the preexamination stage, the polygraph stage, and the postexamination stage. These blanket rejections by Respondent fatally weaken its argument to me that because the employees did not seek an accommodation their *Weingarten* rights must be completely denied.

One may imagine a variety of accommodations which would balance employee *Weingarten* rights against an employer's right to administer polygraph examinations. Perhaps a witness could be allowed an employee at the

[31] Respondent argues on brief that no *Weingarten* violation occurred when management refused to administer examinations to employees who did not sign an unmodified waiver form. This issue is discussed under the portion of the Decision entitled "Remedy."

preinterview held with Hotel management officials where questions could be raised about medication, procedures, and the number and wording of questions to be posed. Perhaps a witness could be included in the polygraph examination process up to the point where the actual examination process was to commence. Certainly a witness could be afforded at the postexamination stage when the examination results were discussed and employees were told they should confess. I find it unnecessary to decide the matter or even to consider further the question of accommodation for I hold that it was incumbent on the Hotel to offer a reasonable accommodation to those employees who made proper and timely requests for accompaniment consistent with *Weingarten*. It is unreasonable to argue that an employee must suggest a means of accommodating the Hotel's right to conduct examinations rather than to so obligate the employer who has both technical expertise and the power to modify the examination process at his disposal. Without finding what particular accommodation was possible herein, I find that some accommodation could have been reached. Respondent's failure to suggest either that accommodation or any other prevents it from now asserting that the examination process would not have been valid unless it denied the employees *all* rights to *any* type of accompaniment whatsoever at *any* stage during the process. Thus, I find, on this record, that the polygraph examinations themselves were *Weingarten* interviews and that the employees had no obligation to initiate or suggest accommodations between their rights to accompaniment and the Hotel's right to administer the examinations.

(3) The postpolygraph interview

Successful examinees were ushered back into the interview room and congratulated by the management representatives. They then departed. Those who failed their polygraph examinations were also returned to the interview room and were there urged by management agents to "come clean" in order to preserve their jobs. In some case employees confessed to minor transgressions, the concealing of which had caused them to fail their examinations; i.e., their examination results indicated "deception." The management interviewers considered the employees' "confessions" and in some cases caused reexaminations to take place in which new questions, excluding reference to the now admitted minor transgressions, were administered. If the employee passed this new examination his or her job was preserved. From these undisputed facts it is clear that the postinterview stage of the process did not simply involve the administering of predetermined discipline. It is clear that the employee's actions and statements at that interview were important factors in determining his or her fate. Certainly discipline, i.e., termination, might result but even a failed examination might be undone and the employee's job saved. Accordingly, I find that the postinterviews conducted by management representatives were interviews at which *Weingarten* rights existed.

c. *The individual interviews*

(1) George Ebersole

Ebersole asked for an attorney to be present at his preexamination interview. His request was denied and the interview held. I have found that a request for a personal attorney is not protected activity.[32] Therefore, I shall dismiss the allegation as to Ebersole.

(2) Jesse Henson and Wanda Jeffords

I have found Henson and Jeffords made no request for a representative of any kind. Accordingly, I shall dismiss this aspect of the complaint. Were my factual resolutions, *supra*, in error, Henson would have been found to have asked: "Aren't we supposed to have legal advice?" Jefford would have asked: "Didn't I get a lawyer?" Even if the employees made these statements I would find no violation for two reasons. First, neither statement rises to the level of a "request" for a representative sufficient to trigger *Weingarten* rights. *Party Cookies, supra*. Second, as noted *supra*, I do not find the request for legal advice or a personal lawyer to be a *Weingarten* request.

(3) Vernon Johnson and Hank Boag

At his preexamination interview Johnson asked for another dealer to be present. Boag asked for a witness.[33] Both were denied their requests and were ultimately discharged for not proceeding with the interview and examination process. This is a classic *Weingarten* violation under the principles and cases cited *supra* and I so find. In denying Johnson and Boag their right to the presence of a fellow employee in their investigatory interviews at which each had a reasonable belief that disciplinary action might result, Respondent violated Section 8(a)(1) of the Act.

(4) Deanne Ball Griffith

I have found that Griffith requested the presence of both a representative and an attorney. The General Counsel argues that the request for an attorney was known by Respondent to be a request for Mike Harrison, the attorney representing an employee committee supporting the Union and acting in concert to protect employees' interests in the polygraph examination process. I have found *supra* that Packe well knew of and had made threats regarding the committee's retention of an attorney. I also find that Griffith's open procommittee actions gave Respondent fair notice that her request was for the committee attorney and not a personal lawyer. The General Counsel's argument seems to be that Harrison was a one-man labor organization entitled to the same considerations as a representative of a traditional labor organiza-

[32] I do not find that this request could reasonably have been taken as a request for attorney Harrison's presence as an *ad hoc* labor organization representative. See further discussion under Griffith *infra*.

[33] Respondent cannot complain that Boag's request was not clearly for a fellow employee for it did not inquire further into the matter but denied his request perfunctorily as it had all requests of any kind. Johnson's request was a continuing request, the denial of which tainted all of Respondent's later actions with respect to Johnson. See also the discussion of Griffith *infra*.

tion. See discussion in *Materials Research Corp.*, 262 NLRB at 1019, fn. 40 (1982) (dissent of Chairman Van de Water).

It is unecessary to reach the merits of this interesting argument for I have also found that Griffith directly requested a representative be present at her interview. As noted *supra*, Respondent was earlier aware through Johnson's letter presented to management that in employee usage the terms "representative" and "another dealer" were synonymous. Under all the circumstances I find Respondent should have taken Griffith's request for a representative to be a request for a fellow employee. Respondent's failure to ask any clarifying questions and its consistent practice of denying all employee requests for the presence of anyone prevents Respondent from successfully arguing the request was insufficiently specific to raise *Weingarten* rights. Griffith did not ask the polygraph examiner for the presence of a coworker. However, I construe the polygraph examination to be but a continuation of her initial interview. Her rights to a witness as well as her initial request for a witness therefore carried over to that portion of the examination process. *Materials Research Corp., supra* at fn. 6. Therefore, Respondent denied her right to a witness at each stage of the polygraph examination process and thereby violated Section 8(a)(1) of the Act. I so find.

(5) Gloria Nelson

Nelson first asked for a representative at her initial interview and made a second request when she was summoned to her meeting with the polygraph examiner. Each request was denied. Like Johnson's and Griffith's I find her request was a continuing one. Each denial violated Section 8(a)(1) of the Act for the reasons noted *supra*. I so find. Again as with Griffith it is unnecessary to address the effect of Nelson's request for a lawyer given her other clearly proper request.

F. *The Appeal Issues*

Paragraphs 29 and 30 of the complaint allege that 13 employees of the Hotel sought to appeal their discharges under Hotel procedures and were denied that opportunity for impermissible reasons in violation of Section 8(a)(1), (3), and (4) of the Act. Following discussion of the general circumstances involved, the individual employees will be discussed *seriatim*.

1. General background

By memorandum dated June 26, 1980, Bob Contois, the general manager, announced the implementation of a board of appeal procedure. This memorandum, which was distributed to employees, described the new procedure. It would apply (1) only to employees not covered by a collective-bargaining agreement, (2) only to employees not coerced by "a collective bargaining unit,"[34] and (3) only to employees who had completed their 90-day probationary period. The procedure involved the use of a three-member panel which was to consider and review "any job-related situation. This includes discharges, warnings, suspension, etc." Outside representatives were prohibited, but employees could call other employees as witnesses and all employees would be paid for time spent in the process. An employee initiated the process by following a described procedure which included making a written request that management convene a board of appeal. Such a request must be filed within 7 days of the "incident" resulting in the adverse action at issue.

There was varied testimony regarding the application of the board of appeal procedure to the polygraph examination process. Rex Kidd testified that, at a question and answer period in a meeting between employees and management, including Packe, Hadler, and Simons, on October 18, Simons was asked the following question and responded as noted:

> The question was asked of Mr. Simons why management was allowed to take the polygraph the second time where the dealers who had fought it, who had refused, were not given that right.
>
> Mr. Simons' response was that if any dealer had flunked the polygraph test and wanted to take it a second time, they would be entitled to that test a second time. He also stated that they had a grievance procedure for dealers that had been fired through Personnel. And in that procedure they had a seven-day period to file notice that they wanted to appeal their firing, and that that procedure would be waived indefinitely, giving them a chance to have time to file a procedure for an appeal on their being fired.

Gary Spinola testified with less specificity regarding the meeting. He recalled that someone from management answered an employee question by asserting, *inter alia*, that the board of appeal procedure was available to terminated dealers and that the time limit for filing the appeal might be waived. Simons did not testify regarding the meeting.

James Skaggs, then the vice president of personnel relations, testified that he made the decision that the appeals process would not apply to the polygraph discharges. He gave the following reasons: (1) the magnitude and scope of the underlying investigation made a grievance unworkable; (2) the participation of state regulatory officers and the potential criminal implications of the investigation would prevent certain testimony from being available in any appeals process; (3) polygraph examiners were outsiders and under the appeals system could not testify; and (4) any individuals represented by a collective-bargaining group could not convene a board of appeal.

[34] The quoted phrasing "a collective bargaining unit" is taken from the memorandum *in haec verba*. The language is quoted by the Hotel in later communications with employees. See discussion *infra*.

2. Individual employees

a. *Henry (Hank) Boag*

Henry (Hank) Boag worked for the Hotel from 1967 to 1977. He returned to the Hotel on August 22, 1980. He was fired on October 10. He filed an "official appeal of my termination" by letter to Art Hadler dated October 12. On October 21, Personnel Director Armstrong sent Boag a letter stating:

> Your request for a Board of Appeal has been received and recorded.
>
> When the current investigation at the Sahara Las Vegas has been completed, we will contact you concerning arrangements.[35]

Boag's name was included in the charge filed by the Union on October 17 in Case 31-CA-10538, which alleged that certain employees were illegally fired by the Hotel. On Octobeer 30, Armstrong sent Boag a letter which stated:

> Your complaint will be resolved through the auspices of the National Labor Relations Board as a result of the filing of a charge. The Board of Appeals is only available to employees not represented by a collective bargaining unit. (Please see attached procedure.)[36]

b. *Robert Brooks*

Robert Brooks was discharged on October 3 and filed an appeal on October 25. Brooks' name was included in the Union's October 8 charge in Case 31-CA-10514. Armstrong sent Brooks a letter dated November 18 which stated:

> Since you are now being represented by a collective bargaining agency the Board of Appeals is no longer available as a grievance procedure. (See attached Board of Appeals Procedure.)[37]

c. *Deanne Griffith*

Deanne Ball Griffith was discharged on October 16. She filed a board of appeal request on October 19. The Hotel sent her the Hotel's acknowledgment letter on October 21. The Hotel sent her the now represented denial letter on October 30. Her name was included in the Union's November 5 charge in Case 31-CA-10610.

d. *Don Henson*

Don Henson was terminated on October 4. He sent the Hotel a written letter captioned "Termination Appeal" dated October 29. His name was included in the Union's charge on October 8 in Case 31-CA-10514. The Hotel did not respond, so far as the record reflects, to Don Henson's appeal.

e. *Jesse Henson*

Jesse Henson was fired on October 11. The record does not indicate when Jesse Henson filed his appeal. The Union's charge in Case 31-CA-10538 filed on October 17 included Jesse Henson. The Hotel sent him the Hotel's now represented denial letter dated November 18.

f. *David Hernandez*

David Hernandez was fired on October 11. He appealed his discharge on October 16 and received the Hotel's acknowledgment letter dated October 21. Hernandez' name was included in the Union's October 17 charge in Case 31-CA-10538. He received the Hotel's NLRB charge and represented employee denial letter dated October 30.

g. *Wanda Jeffords*

Jeffords was discharged on October 18. She appealed her termination by letter dated November 3. She was listed in the Union's November 5 charge in Case 31-CA-10610. On November 18 the Hotel sent Jeffords its now represented denial letter.

h. *Vernon Johnson*

Vernon Johnson was terminated on October 8, 1980. The date of Johnson's appeal is not evident. However, the Hotel sent Johnson its acknowledgment letter dated October 24. The Hotel on October 30 sent Johnson its NLRB charge and represented employee denial letter.

i. *Gloria Nelson*

Nelson was discharged on November 18, 1980. On November 19 Nelson wrote to Hadler requesting to meet again with management so that she could sign the waiver. Her letter stated in part:

> Please consider this to be my request to have the meeting with management so I can execute the form that was presented to me last night. Although I realize that I will not be allowed to alter the form, I would like management records to request that the form statement referring to "voluntary" and "without duress" are qualified to the extent that I am subjecting myself to the examination under the threat of termination, or the refusal of reinstatement for the termination that has previously occurred. Also, to the extent that my actions do not constitute a waiver of any rights I may have against management with reference to subjecting me to the polygraph examination, it is not my intent to waive any such rights.

On November 23, Nelson invoked her right to appeal in a letter in which she said she was, consistent with her letter of November 19, willing to "submit herself to a polygraph test." Hadler by letter dated December 5 ac-

[35] This letter and other letters by Armstrong to other employees with identical wording will be hereinafter referred to as the Hotel's acknowledgment letter.

[36] This letter and other letters by Armstrong to other employees with identical wording will hereinafter be referred to as the Hotel's NLRB charge and represented employee denial letter.

[37] This letter and other letters by Armstrong to other employees with identical wording will hereinafter be referred to as the Hotel's now represented denial letter.

knowledged receipt of Nelson's letter of November 19 and informed Nelson, *inter alia*, that her request to take the "examination under the terms outlined in your letter" was declined. It noted: "In addition, *no employees or supervisor* was allowed to take the examination with the qualifications outlined in your letter." There is no evidence of a further communication with Nelson by the Hotel regarding her appeal.

j. *Tom Powers*

Powers was discharged on October 3. He appealed on October 22. He was named in the Union's charge in Case 31-CA-10514 on October 10. He received the Hotel's NLRB charge and represented employee denial letter dated October 30.

k. *Hans (Walter) Scheller*

Scheller was discharged on October 3. He appealed his discharge on October 19. He was included in the Union's charge in Case 31-CA-10514. Scheller received the Hotel's acknowledgment letter dated October 24. He thereafter received the Hotel's NLRB charge and represented employee denial letter dated October 30.

l. *Jerry Simpson*

Simpson was fired on October 19, 1980. He appealed his discharge on October 19. Simpson filed his charge in Case 31-CA-10530 on October 17. He received the Hotel's NLRB charge and represented employee denial letter dated October 30.

m. *Vincent Giagni*

Vincent Giagni is the only employee involved in the appeals dispute who was not fired as a result of the polygraph examination process. He was fired on January 25, 1982, from his position as a dice dealer. His termination is not alleged as a violation of the Act. He went to Armstrong with the expressed intention of filing a notice of appeal on February 1, 1982. He testified, credibly and without contradiction, that Armstrong told him that as a dice dealer the board of appeal was not available to him because the dealers "had selected a union to represent us, and that any grievance would be handled in arbitration by the union." No written appeal was ever filed; rather, the Union filed a charge with the Board. At no time has the Hotel recognized the Union or bargained with it in any fashion.

3. Analysis and conclusions

a. *The communication of reasons for the denial of appeal rights as an independent 8(a)(1) violation*

Irrespective of the actual motive of Respondent for denying the appeals of employees or the propriety of the denials under the Act, Respondent's communications to employees as to the reasons for management's denial of their appeals are in issue as a separate violation of Section 8(a)(1) of the Act. Employees were told, by letter, and in Giagni's case orally, as set forth *supra*, they could not utilize the Hotel's appeals process either because they had selected the Union or because an NLRB charge had been filed and they had selected the Union. Irrespective of the truth of the statement, telling employees that they have lost important employment rights, here the right to utilize the appeals process, because the employees selected the Union and/or because a charge was filed with the Board clearly informs employees their rights have been diminished because of those protected activities. Such statements perforce chill employees' exercise of these Section 7 rights and therefore the statements, in each case, violate Section 8(a)(1) of the Act and I so find.[38]

b. *The denial of appeal rights as a violation of Section 8(a)(3) and (4)*

There is no dispute that the denial of an employee's right to an internal appeal of adverse action may not properly be denied because employees selected a union to represent them or because a charge was filed with the Board dealing with the same issue. Thus, if the reasons given the employees for the denial of their appeals, discussed individually *supra*, were the true reasons for the Hotel's denial of appeal rights, then Section 8(a)(3) and (4) of the Act was violated as alleged in the complaint.

It is at least inferrable that the reasons given each employee for denying his or her right to appeal by the Hotel was in fact the Hotel's true reason absent evidence to the contrary. Given that the Hotel's appeals procedure on its face denies represented employees the right to use the procedure, albeit ambiguously as a result of the confusing language cited *supra*, and that management's agents testified that one of the reasons the Hotel denied dealers appeal rights was the election victory of the Union, it is clear and I find that the Union victory was at least one reason for the denial. Consistent with the letters denying the right to appeal to certain of the employees[39] because of the filing of NLRB charges, I find this too was a reason for denying appeal rights.

Respondent asserts, however, that other reasons existed for denying the particular employees their appeal rights. Four defenses were raised: (1) that management never intended to apply the appeals process to the polygraph discharges; (2) that certain employees were disqualified under the appeals procedure through late filing of their requests to appeal; (3) that Giagni never filed an appeal under the procedure; and (4) that Boag did not qualify under the appeals procedure because he was a probationary employee.

Dealing first with Boag, it is clear that, by counting only his most recent period of employment with the Hotel, he had not served 90 days before his discharge. Thus, if he was regarded as a new employee upon reemployment in 1980 he was not qualified to use the procedure. If his previous service is counted, however, Boag clearly had sufficient service to use the procedure. No

[38] Indeed, the June 26, 1980, memo expressly limits the benefits offered as available only to unrepresented employees and may itself violate the Act. Since the matter was not alleged in the complaint, I will make no finding in regard thereto.

[39] Employees Boag, Hernandez, Johnson, Powers, Schiller, and Simpson received letters identifying the filing of an NLRB charge as one reason for the denial of their appeal.

evidence was offered on the issue of how broken or discontinuous service is counted by the Hotel under either specific personnel rule or past practice. I need not decide if Boag was in fact eligible or ineligible under the wording of the procedure and the Hotel's practice, however. I need not for I am satisfied that there is no evidence either that Boag was known to be an arguably probationary employee at the time he was denied his appeal rights or that the Hotel ever denied any employee the right to use the procedure because of length of service at any time, especially an employee with extensive previous service. I come to this conclusion because the Hotel initially acknowledged Boag's appeal by letter without reference to his now argued probationary status. When the Hotel told him he was ineligible, only two reasons were given: (1) the fact of the filing of the NLRB charge and (2) the fact that the dealers' unit was now "represented." While all of the above is not sufficient to prove that Boag's argued probationary status would not also have disenfranchised him, I find the evidence sufficient to shift the burden to Respondent to come forward with evidence to show that, in fact, probationary employees have by rule or practice been denied use of the Hotel's appeals procedure. Respondent did not come forward with such evidence and, accordingly, its defense as to Boag must fail.

I reach the same result concerning the timeliness of certain employees' requests for appeals and reject the Hotel's "timeliness" defense as to those employees who filed allegedly untimely appeal requests for the following reasons. First, the analysis of Respondent's specific defense as to Boag may be applied with equal force to those employees who filed requests for appeals more than 7 days after their discharges; i.e., beyond the time limit set on the face of the procedure. Second, and more importantly, however, irrespective of the Hotel's actual practice regarding untimely filings, I rely heavily on credited testimony, noted *supra*, that management explicitly told employees that it would waive the 7-day filing requirement with respect to individuals discharged as part of the polygraph procedure. This is a waiver which appears to have been relied on by certain employees and which Respondent cannot now retract. Accordingly, I find Respondent's timeliness defense without merit.

As to Giagni, Respondent correctly argues he did not file a written request for an appeal with the Hotel. I find he did not do so because he was told by Armstrong he was not eligible to appeal his discharge assertedly because he was now represented by the Union. Respondent argues on brief, in another context, that the Board does not require a party to engage in a futile act. That doctrine is applicable here. Giagni went to file an appeal and was dissuaded. Having been told by the personnel director he was not eligible to file an appeal, Giagni will not be denied standing to contest his denial of appeal rights because he failed to do what management told him would be futile and ineffective. Respondent's defense as to Giagni fails here.

Respondent's general defense to the appeals issue relies on the testimony of Skaggs, noted *supra*, to show that the appeals procedure was withheld from the October discharged employees for several not improper reasons, including the fact that management had decided it would not be used to review the polygraph discharges. Thus, Respondent seeks to show that, since no employee, save perhaps Giagni, would have had an appeal right in any event, the denials were not in fact the result of protected conduct. I reject this argument initially because I discredit the testimony of Skaggs. While no direct evidence could be offered to rebut the testimony of Skaggs concerning his subjective reasoning and motivations regarding the appellate process, the General Counsel has successfully amassed a bulk of contrary secondary evidence which considered *in toto* renders Skaggs' version of events incredible. Thus, there is the total absence of any statement by any member of management to any employee at any time that the polygraph examinations and resultant discipline would fall without the appeals procedure. Rather, to the contrary, as found *supra*, management specifically told employees that the appeals procedure would be available to polygraph discharges and, indeed, that the time limit for filing an appeal would be waived. Finally, the following factors factually injure Respondent's claim. The appeals procedure itself denied eligibility to represented employees. All October discharged employees were told that their eligibility was lost by Respondent because they were represented by the Union and not because discharges as a result of the polygraph process were not subject to appeal. Giagni, too, was told, well after the polygraph process had been concluded, that he had lost his eligibility to appeal his discharge because he was represented by a union. These multiple factors conclusively demonstrate that the reasons Respondent denied employees their appeal rights were in fact the reasons given to them and not for any other reasons. Accordingly, I find that, by denying the employees, listed *supra*, their right to appeal their discharges under the Hotel's internal appeals procedure because they were represented by the Union, Respondent violated Section 8(a)(3) and (1) of the Act. As to those employees, listed *supra*, who were further denied their appeal rights because a charge had been filed with the NLRB, Respondent also violated Section 8(a)(4) and (1) of the Act.

## IV. REMEDY

### A. *General Remedy*

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including the posting of a notice to employees with traditional remedial language.

The violations of the Act concerning the denial of the use of the Hotel's appeals procedure and the denial of the employees' request for the presence of a representative present additional issues regarding the appropriate remedy for these violations. The various issues are treated separately *infra*.

B. *Weingarten Violations*

The General Counsel seeks reinstatement and a make-whole order with respect to the four employees whose *Weingarten* rights were violated. The circumstances of the four employees involved differ and they must be treated in two separate categories.

Boag and Johnson were terminated as a result of their prepolygraph management interview when each made his *Weingarten* request for accompaniment. I find that each was fired because of the request and not for any other failure or refusal to participate in the polygraph examination process. Neither refused to sign the waiver form management presented other employees. The polygraph examination was administered to neither employee. Their terminations are therefore discharges based solely on the assertion of protected rights and the terminations are therefore independent violations of Section 8(a)(1) of the Act. Terminations for protected activities may be fully remedied only by a traditional reinstatement and make-whole order.

Having found that Respondent terminated the employment of Boag and Johnson in violation of Section 8(a)(1) of the Act, I shall order Respondent to offer Boag and Johnson immediate and full reinstatement to their former positions of employment or, if said positions are no longer available, to substantially equivalent positions, without prejudice to any seniority or other rights or privileges to which they may have been entitled. I shall also order that Respondent make Boag and Johnson whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them to be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), together with interest thereon in accordance with the policy of the Board set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977); see also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I shall also order Respondent to expunge from its files any reference to the discharges of Boag and Johnson, and notify each in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

Nelson and Griffith present a different set of circumstances. As I have found, *supra*, each was denied her *Weingarten* rights. Each, however, was terminated when, after protracted argument and discussion, each ultimately refused to sign an unmodified waiver form. Respondent argues that, irrespective of any technical violation of *Weingarten*, employees who were terminated because they refused to sign the waiver should neither be made whole nor reinstated. Respondent reasons as follows: (1) asking an employee to sign a waiver is not a *Weingarten* situation, (2) an employer may properly insist an employee sign such a waiver, (3) employee refusal to sign such a waiver is insubordination, (4) an employee may be fired for such insubordination, and (5) accordingly the instant discharges were for unprotected insubordination and are not a violation of the Act.

Dealing with Respondent's first premise, it is enough to say that the waiver was tendered by management during meetings in which employee *Weingarten* rights were being violated. It is unnecessary to decide if asking an employee to sign a waiver in isolation raises *Weingarten* rights because such an insolated event did not occur in the case of any employee.

Respondent's remaining arguments must be examined in light of the Board's recent decision in *L. A. Water Treatment*, 263 NLRB 244 (1982), which applied the Board's standard remedy analysis in *Weingarten* situations to facts analagous to the instant case. The standard test is set forth in *Kraft Foods*, 251 NLRB 598 (1980), where the Board stated at 598:

> In determining the appropriate remedy for a respondent's violation of an employee's *Weingarten* rights, the Board applies the following analysis. Initially, we determine whether the General Counsel has made a *prima facie* showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.
>
> In the face of such a showing, the burden shifts to the respondent. Thus, in order to negate the *prima facie* showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remedy will not be ordered. Instead, we will provide our traditional cease-and-desist order in remedy of the 8(a)(1) violation.

In *L. A. Water* an employee was summoned to a meeting which the employee reasonably believed might result in discipline. The employee requested and was denied representation. The meeting was held by the employer to obtain assurances from the employee that he would not be insubordinate in the future. When the employer did not obtain the assurances it desired, it decided that the employee was uncooperative and discharged the employee for his conduct at the meeting. On these facts the Board found that the denial of the employee request violated the employee's *Weingarten* rights. The Board specifically held that the termination was not an independent violation of the Act, but rather must be considered only under a remedy analysis consistent with *Kraft Foods*. The Board then applied the *Kraft Foods* analysis. It found that the General Counsel's *prima facie* case was met by proving that the employee was discharged for failing to provide assurances that he would no longer be insubordinate. In a footnote the Board noted that the subject of the interview was insubordination. It held the employee's failure to give assurances regarding insubordination was "inextricably intertwined" with the insubordinate conduct. The Board concluded the employee was discharged for conduct which was the subject of the interview. It noted further that the employer admitted that its decision as to what action to take regarding the employee was contingent upon what occurred at the

meeting. Under all these circumstances the Board held that a make-whole remedy was appropriate.

Applying the above analysis to the instant case, I find that the Hotel's terminations of Nelson and Griffith, unlike those of Boag and Johnson, do not constitute independent violations of the Act under a *Weingarten* theory. I further find, however, that the subject of their interviews and the "insubordination" of their refusing to sign the waiver form are "inextricably intertwined" and that therefore Nelson and Griffith were discharged for the conduct which was the subject of the interview. Indeed, as in *L. A. Water*, Respondent admittedly decided what action to take against Nelson and Griffith based on what occurred at the meeting with each employee from which a properly requested witness had been improperly excluded. Accordingly, I find reinstatement, make-whole, and expunction orders appropriate herein consistent with the case and rationale cited, *supra*, for employees Boag and Johnson. I so order.

### C. *The Wrongful Denial of Appeal Rights*

I have found various employees were wrongfully denied their right to appeal their discharges under the Hotel's board of appeal procedure. Certain of these employees have been afforded other remedies as a result of my remedy of other violations of the Act by Respondent. To the extent that those other remedies affect the discharges of the instant employees, the remedial provisions herein may be mooted or rendered otherwise redundant. In such cases they may be disregarded. It is possible, however, that subsequent review of my rulings and recommended remedy regarding other violations found may reverse or significantly modify those rulings. Accordingly, I here address the remedy necessary for the employees' denied appeal rights assuming my remedy ordered here as to employees Boag, Johnson, Nelson, and Griffith is not mooted by other portions of this Decision.

Since Respondent has improperly denied employees their right to utilize the Hotel's internal appeals procedure, I shall order Respondent to rescind its denial letters, described *supra*, and process the employees' appeal requests as if they had not been denied. In processing these appeals, the Hotel shall utilize the practices and procedures in force at the time the particular employee's appeal was filed and shall not rely on the appeal provisions and limitations found improper herein. Further, Respondent shall not in any fashion assert directly or indirectly the passage of time caused by Respondent's delay in processing the appeals so as to diminish employee rights under the procedure.

In the event the passage of time and the occurrence of events not attributable to any employee's subsequent unreasonable failure to proceed with the appeals process have caused the appeals procedure to be impossible to utilize or unlikely to produce a result equivalent to the result which would have been achieved if timely processed originally, the employee's appeal will be granted automatically and Respondent will take the action which would have been required of it had the employee's appeal been successful, including reinstatement and backpay consistent with my analysis *supra*. I so order because, where it becomes impossible to resolve an uncertain situation, such uncertainty will be resolved against the wrongdoer who has created the uncertainty; i.e., Respondent here. Cf. *King Soopers*, 222 NLRB 1011 (1976); *Massachusetts Laborers' District Council (Manganaro Masonry)*, 230 NLRB 640, 644 (1979).

I find that it is impossible to now restore the right of appeal of employee Jesse Henson since he is dead. I shall therefore order Respondent to take all action it would have taken if his appeal had been successful. Given his death, reinstatement is not available; however, Respondent shall pay Henson's estate the amount of money he would have earned, minus interim earnings, until the time when Henson's health would have prevented him from continuing employment with Respondent consistent with the Board's normal make-whole standards and the cases cited *supra* as to Boag and Johnson. Respondent shall also provide Jesse Henson's estate with a sum equal in value to all other benefits Henson would have received during the period he would have remained in its employ. All sums owing will accrue interest in accordance with the cases cited *supra*. As to other employees, it is unnecessary now to determine if a resumed processing of the appeals procedure is possible or practicable. Such determinations may be made as to each employee during the compliance stage of these proceedings. The Board in similar situations has retained jurisdiction over specific cases to consider appropriate affirmative remedial provisions where initial affirmative orders are ineffective. E.g., *Electrical Workers IUE Local 485 (Automotive Plating)*, 170 NLRB 1234 (1968); *Port Drum Co.*, 170 NLRB 555 (1968).

Based on the foregoing findings of fact and the record as a whole, I make the following:

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Telling employees engaged in union activities that they were under discussion by high management officials.

(b) Interrogating employees about their union activities, their protected concerted activities, and the union and protected concerted activities of other employees.

(c) Threatening employees with adverse consequences at the Hotel if they select the Union as their representative, including threats that:

(1) The facility could close.

(2) Tips or "tokes" would be taxed.

(3) Benefits would be reduced.

(d) Telling employees that antiunion employees were being hired or that an employee was hired because he was antiunion.

(e) Telling employees that employees' attempts to select the Union would be futile.

(f) Denying the following employees their requests for the presence of a fellow employee at investigative or dis-

ciplinary meetings at which the employees reasonably believed disciplinary actions might result:

| | |
|---|---|
| Henry (Hank) Boag | Gloria Nelson |
| Vernon Johnson | Deanne Ball Griffith |

(g) Discharging employees Boag and Johnson because they requested the presence of a fellow employee at investigative meetings at which they reasonably believed discipline might result.

(h) Telling employees they had been denied use of an internal discharge review procedure because they selected the Union to represent them and/or because a charge had been filed with the Board concerning their discharges.

4. Respondent violated Section 8(a)(3) and (1) of the Act by denying the following employees the use of an internal discharge review procedure because employees selected the Union to represent them:

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Robert Brooks | Gloria Nelson |
| Deanne Ball Griffith | Tom Powers |
| Don Henson | Hans (Walter) Scheller |
| Jesse Henson | Jerry Simpson |
| David Hernandez | Vincent Giagni |
| Wanda Jeffords | |

5. Respondent violated Section 8(a)(4) and (1) of the Act by denying the following employees the use of an internal discharge review procedure because the employees were named in a charge or charges filed with the National Labor Relations Board:

| | |
|---|---|
| Henry (Hank) Boag | Tom Powers |
| David Hernandez | Hans (Walter) Scheller |
| Vernon Johnson | Jerry Simpson |

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as noted *supra*, Respondent has not violated the Act.

Based upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommened:

## ORDER[40]

The Respondent, Consolidated Casinos Corporation, Sahara Division, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees engaged in union activities that they were under discussion by high management officials.

(b) Interrogating employees about their union activities, their protected concerted activities, and the union and protected concerted activities of other employees.

(c) Threatening employees with adverse consequences at the Hotel if they select the Union as their representative, including threats that:

(1) The facility could close.

(2) Tips or "tokes" would be taxed.

(3) Benefits would be reduced.

(d) Telling employees that antiunion employees were being hired or that an employee was hired because he was antiunion.

(e) Telling employees that employees' attempts to select the Union would be futile.

(f) Denying the following employees their requests for the presence of a fellow employee at investigative or disciplinary meetings at which the employees reasonably believed disciplinary actions might result:

| | |
|---|---|
| Henry (Hank) Boag | Gloria Nelson |
| Vernon Johnson | Deanne Ball Griffith |

(g) Discharging employees Boag and Johnson because they requested the presence of a fellow employee at investigative meetings at which they reasonably believed discipline might result.

(h) Telling employees they have been denied use of an internal discharge review procedure because they selected the Union to represent them and/or because a charge had been filed with the Board concerning their discharges.

(i) Denying the following employees the use of an internal discharge review procedure because employees selected the Union to represent them:

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Robert Brooks | Gloria Nelson |
| Deanne Ball Griffith | Tom Powers |
| Don Henson | Hans (Walter) Scheller |
| Jesse Henson | Jerry Simpson |
| David Hernandez | Vincent Giagni |
| Wanda Jeffords | |

(j) Denying the following employees the use of an internal discharge review procedure because the employees were named in a charge or charges filed with the National Labor Relations Board:

| | |
|---|---|
| Henry (Hank) Boag | Tom Powers |
| David Hernandez | Hans (Walter) Scheller |
| Vernon Johnson | Jerry Simpson |

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer the following employees full reinstatement to their former jobs or, if a particular job no longer exists, to a substantially equivalent position, without prejudice to seniority and other rights and privileges, and make each employee whole, with interest, in accordance with the section of this decision entitled "Remedy":

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Deanne Ball Griffith | Gloria Nelson |

[40] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Expunge from its records and files any and all references to the unlawful discharges of employees Boag and Jeffords and the discharges of Griffith and Nelson and any reference to the failure of these employees to cooperate in the polygraph investigation process, and, further, notify said employees, in writing, that this has been done and that evidence of the discharges or the failure to cooperate in the investigation will not be used as a basis for future personnel action against them.

(c) Pay to the estate of former employee Jesse Henson an amount of money equal in value to the amount Jesse Henson would have earned in wages and other benefits had he continued his employment so long as his health would allow, minus interim earnings plus appropriate interest, all sums to be computed as described in the section of this Decision entitled "Remedy."

(d) Rescind its denial of the requests of the following employees to appeal their discharges and notify each employee in writing that he or she may utilize the appeal procedure as it existed at the time the appeal was requested and, thereafter, process all appeals in good faith without asserting the passage of time caused by the delay in the appeal procedure's utilization in any manner to diminish the claims of the employees:

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Robert Brooks | Gloria Nelson |
| Deanne Ball Griffith | Tom Powers |
| Don Henson | Hans (Walter) Scheller |
| David Hernandez | Jerry Simpson |
| Wanda Jeffords | Vincent Giagni |

(e) Notify the Regional Director or his agents of the processing of the appeals described above so that the Board may ascertain the effectiveness of the employees' utilization of the appeals process and determine if additional affirmative remedies are necessary.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll, personnel, and any and all other records necessary to determine the specific sums due under this Order and to ensure that the Order has been complied with.

(g) Post at its Sahara Hotel facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[41] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by its authorized representative, shall be posted by Consolidated Casinos Corporation, Sahara Division, at its Sahara Hotel in Las Vegas, Nevada, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Consolidated Casinos Corporation, Sahara Division, to ensure that said notices are not altered, defaced, or covered by any other material.

[41] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice and obey its provisions.

WE WILL NOT tell employees engaged in union activities that they were under discussion by high management officials.

WE WILL NOT interrogate employees about their union activities, their protected concerted activities, and the union and protected concerted activities of other employees.

WE WILL NOT threaten employees with adverse consequences at the Hotel if they select the Union as their representative, including threats that:

(1) The facility could close.
(2) Tips or "tokes" would be taxed.
(3) Benefits would be reduced.

WE WILL NOT tell employees that antiunion employees were being hired or that an employee was hired because he was antiunion.

WE WILL NOT tell employees that employees' attempts to select the Union would be futile.

WE WILL NOT deny the following employees their requests for the presence of a fellow employee at investigative or disciplinary meetings at which the employees reasonably believed disciplinary actions might result:

| | |
|---|---|
| Henry (Hank) Boag | Gloria Nelson |
| Vernon Johnson | Deanne Ball Griffith |

WE WILL NOT discharge employees Henry (Hank) Boag and Vernon Johnson or any other employee because they requested the presence of a fellow employee at investigative meetings at which they reasonably believed discipline might result.

WE WILL NOT tell employees they have been denied use of an internal discharge review procedure because they selected the Union to represent them and/or because a charge had been filed with the Board concerning their discharges.

WE WILL NOT deny the following employees the use of an internal discharge review procedure because employees selected the Union to represent them:

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Robert Brooks | Gloria Nelson |
| Deanne B. Griffith | Tom Powers |

| | |
|---|---|
| Don Henson | Hans (Walter) Scheller |
| Jesse Henson | Jerry Simpson |
| David Hernandez | Vincent Giagni |
| Wanda Jeffords | |

WE WILL NOT deny the following employees the use of an internal discharge review procedure because the employees were named in a charge or charges filed with the National Labor Relations Board:

| | |
|---|---|
| Henry (Hank) Boag | Tom Powers |
| David Hernandez | Hans (Walter) Scheller |
| Vernon Johnson | Jerry Simpson |

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer the following employees full reinstatement to their former jobs or, if a particular job no longer exists, to a substantially equivalent position, without prejudice to seniority and other rights and privileges, and make each employee whole for losses resulting from our discrimination against him, with interest:

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Deanne B. Griffith | Gloria Nelson |

WE WILL expunge from our records and files any and all references to the unlawful discharges of employees Henry (Hank) Boag and Vernon Johnson and the discharges of Deanne Ball Griffith and Gloria Nelson and any reference to the alleged failure of these employees to cooperate in the polygraph investigation process, and, further, WE WILL notify said employees, in writing, that this has been done and that evidence of the discharges or the alleged failure to cooperate in the investigation will not be used as a basis for future personnel action against them.

WE WILL pay to the estate of former employee Jesse Henson an amount of money equal in value to the amount Jesse Henson would have earned in wages and other benefits had he continued his employment so long as his health would allow, minus interim earnings plus appropriate interest.

WE WILL rescind our denial of the following employees' requests to appeal their discharges and notify each employee in writing that he or she may utilize the appeal procedure which was in effect at the time the appeal was requested and, thereafter, will process all appeals in good faith without asserting the passage of time caused by the delay in the appeal procedure's utilization in any manner to diminish the claim of the employees:

| | |
|---|---|
| Henry (Hank) Boag | Vernon Johnson |
| Robert Brooks | Gloria Nelson |
| Deanne B. Griffith | Tom Powers |
| Don Henson | Hans (Walter) Scheller |
| David Hernandez | Jerry Simpson |
| Wanda Jeffords | Vincent Giagni |

WE WILL notify the Regional Director or his agents of the processing of the appeals described above so that the Board may ascertain the effectiveness of the employees' utilization of the appeals process and determine if additional affirmative remedies are necessary.

CONSOLIDATED CASINOS CORPORATION,
SAHARA DIVISION